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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JULIUS GOLDMAN'S EGG CITY,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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April 8, 1983

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QUESTIONS PRESENTED *

1. May a federal agency disregard the standards of fair market value it has adopted pursuant to a statutory indemnification program and instead compensate an indemnitee on the basis of rigid formulas that, as applied, are inconsistent with those standards?

2. May a court reviewing the actions of a federal agency substitute its own standards of fair market value for the standards promulgated by that agency pursuant to statute?

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* The Kroger Company is the parent corporation of petitioner Julius Goldman's Egg City.

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No.

JULIUS GOLDMAN'S EGG CITY,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The petitioner, Julius Goldman's Egg City, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Federal Circuit that affirmed the dismissal of the petitioner's claim by the trial division of the United States Court of Claims (now the United States Claims Court).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, 697 F.2d 1051 (Fed. Cir. 1983), is reproduced below at App. 1a-12a. The unreported decision of the trial division of the Court of Claims is reproduced below at App. 13a-31a. The opinion of the Court of Claims denying the respondent's motion for summary judgment, 214 Ct. Cl. 345, 556 F.2d 1096 (1977), is reproduced below at App. 32a-46a.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed is dated January 10, 1983. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §§ 1254 and 2101(c).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves 21 U.S.C. §§ 114-114a, 134-134h (1970), reproduced below at App. 49a-56a, and 9 C.F.R. §§ 53.1-53.10 (1975), reproduced below at App. 57a-62a.

STATEMENT OF THE CASE

This case arises from the failure of the United States Department of Agriculture to comply with the standards and regulations it had adopted for indemnifying poultry owners for the forced destruction of their flocks.

The case involves the respondent's program to control an epidemic of exotic Newcastle disease that affected commercial poultry ranches in southern California in 1972. Acting pursuant to authority conferred by 21 U.S.C. § 114a, the respondent, through the Secretary of Agriculture (the "Secretary"), declared a national emergency in March of that year and instituted a program to destroy poultry flocks that it determined had been infected with or exposed to the disease.

The petitioner, Julius Goldman's Egg City, is the largest egg ranch in the world. In 1972 it had some 3.4 million chickens, capable of producing 900,000 eggs daily, and was about 50 times larger than the average poultry ranch involved in the government's exotic Newcastle disease eradication program. Unlike any other ranch involved in the government program, Egg City controlled all aspects of egg production from the hatching of baby chicks through the packaging and processing of a va-

riety of finished egg products for sale directly to supermarkets and food manufacturers. For example, while other poultry ranches obtained their birds from outside companies, Egg City raised its own birds from hatching eggs at its own facilities under the care and supervision of its own full-time staff. It purposely spent more in raising those birds in order to produce more productive birds and, ultimately, more income. It fed its birds high protein feed rations produced by its own feed mill, and inoculated them with vaccines developed by its full-time veterinary staff at its own laboratories. It was undisputed at trial that the expenses incurred by Egg City in raising and caring for its birds were far higher than those of the average ranch.

All of Egg City's 3.4 million chickens were destroyed pursuant to the exotic Newcastle disease eradication program. Although it was but one of 159 ranches affected by the program, Egg City's flock accounted for more than thirty percent of the 11 million chickens killed.

The statute authorizing the destruction of infected and exposed animals requires that owners of such animals be compensated for their "fair market value as determined by the Secretary." 21 U.S.C. § 134a(d) (1970). Pursuant to that authority, the Secretary provided by regulation that the "fair market value" of a laying hen is to be measured by its "egg production" value. 9 C.F.R. § 53.3(b).

In his administration of the exotic Newcastle disease emergency, the Secretary clearly announced and adopted a two-part indemnification program to compensate poultry owners as required by law. Initially, the government paid an indemnity that was intended to reflect the *cost* of obtaining replacement birds. Subsequently, the Secretary determined that an indemnity based only on replacement costs was inadequate to compensate commercial egg producers for the full "egg production" value of their flocks. Accordingly, the Secretary instituted a separate, supplemental indemnity program to compensate those

producers for their loss of *income* from egg sales during the period necessarily required to replace their flocks.

Having adopted standards that were reasonable on their face, however, the Secretary implemented them in an arbitrary and unreasonable fashion with respect to Egg City. The Department of Agriculture employees who administered the program insisted on compensating Egg City under both the initial and supplemental indemnities on the basis of rigid formulas that were established early in the program and keyed to the "average" poultry ranch—that is, a ranch that was less than 1/50 the size of Egg City and that obtained and raised its birds in a significantly different way. More precisely, the Department determined that an average ranch could obtain comparable replacement birds at a rate of $2.00 for a prime-age bird and could totally repopulate within 26 weeks.[1]

While acknowledging that Egg City constituted a special case, the Department insisted that its indemnity formulas had to be applied uniformly and without exception to all ranches involved in the program.[2] As a result, Egg City was paid an initial indemnity that was far below its actual cost of obtaining replacement birds.[3] It was also paid a supplemental indemnity that inadequately compensated it for lost egg sales during the period required for it to get back into full production, which was much longer than that of any other egg ranch. (It was undisputed at trial that Egg City repopulated as fast as possible. Nevertheless, because there were not enough chickens on the market, it took Egg City over two years to replace its flock.) In short, in applying its formulas rigidly to

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[1] The top $2.00 rate was adjusted downward based on the chickens' ages.

[2] It was undisputed at trial, however, that, contrary to the announced requirement for uniform treatment, the indemnity formulas were in fact altered to accommodate the special circumstances of ranches other than Egg City.

[3] The indemnity paid was also less than the amount spent by Egg City in raising the birds that were destroyed.

Egg City, the Department of Agriculture violated the standards promulgated by the Secretary for compensating ranches under the disease eradication program. The Secretary's failure to adjust his indemnity formulas to accommodate the special circumstances of Egg City denied Egg City the compensation to which it was entitled under the statute and regulations.

In October of 1975, Egg City filed a petition in the United States Court of Claims seeking additional indemnification. Federal jurisdiction was invoked pursuant to 28 U.S.C. § 1491. A motion for summary judgment by the Government was denied by the Court of Claims. *Julius Goldman's Egg City* v. *United States*, 214 Ct. Cl. 345, 556 F.2d 1096 (1977). On remand, the lower court judge (a trial judge in the trial division of the then Court of Claims) dismissed the petition after trial. On January 10, 1983, the Court of Appeals for the Federal Circuit, which had come into existence subsequent to the trial judge's decision, affirmed what had become the lower court decision. 697 F.2d 1051.

REASONS FOR GRANTING THE WRIT

I. THE SECRETARY FAILED TO INDEMNIFY EGG CITY FOR THE DESTRUCTION OF ITS POULTRY FLOCK IN ACCORDANCE WITH THE INDEMNIFICATION STANDARDS HE HAD ESTABLISHED

This case involves one question of overriding importance: whether a federal agency, having adopted and announced standards pursuant to its statutory authority, may then disregard those standards in the course of carrying out its statutory program. That is precisely what the Department of Agriculture did in this case.

Congress granted the Secretary of Agriculture sweeping authority to eradicate communicable diseases of poultry by any necessary means, including destroying diseased or exposed birds. 21 U.S.C. §§ 114a, 134a (1970). It also expressly provided that the owners of destroyed poultry must be indemnified for their loss:

> "[T]he Secretary shall compensate the owner of any animal, carcass, product, or article destroyed pursuant to the provisions of this section. Such compensation shall be based upon the fair market value as determined by the Secretary, of any such animal, carcass, product, or article at the time of the destruction thereof." 21 U.S.C. § 134a(d) (1970).

In accordance with his statutory mandate, the Secretary adopted and promulgated a regulation requiring the owners of egg-producing chickens to be indemnified for the "fair market value" of their poultry determined by the "egg production" value of that poultry. 9 C.F.R. § 53.3(b). Applying that standard to the exotic Newcastle disease eradication program, the Secretary, acting pursuant to his statutory authority, further determined that proper indemnification for the egg-producing flocks destroyed during the program required payment of a two-part indemnity: (1) an "initial" indemnity to reflect the cost of obtaining replacement birds, and (2) a "supplemental" indemnity to reimburse poultry owners for egg income lost during the time required to replace their flocks.

The regulation and the two-part indemnity implementing it were adopted by the Secretary in recognition of the fact that a commercial laying hen is a special animal. It is, in effect, "an egg-laying machine." Accordingly, the Secretary determined that, in addition to the cost of replacing it, such a bird also has a value assignable to the income potential attributable to the sale of its eggs until a replacement bird can be obtained and become productive.

There was no real dispute over the announced purpose of either indemnity. A number of contemporaneous Department of Agriculture documents and public statements explaining the policies underlying the Secretary's two-part indemnification program were introduced into

evidence at trial.[4] In addition, the Court of Claims, in its opinion denying the government's motion for summary judgment, confirmed that the Secretary of Agriculture had determined that proper indemnification for destroyed laying flocks required the payment of *both* (1) an initial

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[4] Although the courts below in their opinions conspicuously ignored the stated purposes of either indemnity, they were clearly set forth in the record. For example, the rationale adopted by the Secretary as the basis for the supplemental indemnity was described as follows in a contemporaneous memorandum by a government economist:

> "Loss of corollary income potential from eggs incurred by the owner during the period required to get back into production ought to be considered as well as the loss of the layer at the time of appraisal." (Plaintiff's Exhibit ("PX") 34.)

The purpose of the second indemnity was further explained in a Department of Agriculture press release issued on October 9, 1972 and reproduced at App. 63a-64a:

> "The new indemnity schedule is designed to reimburse poultrymen for lost income from the sale of eggs their birds would have produced had they not been killed . . . .
>
> "A 26 week period, following the appraisal of a flock, is used as the basis for the new indemnity formula. This is considered the time period it will take a poultryman to safely restock and get back into break-even operation." (PX 10, p. 1.)

The Secretary affirmed these policies in an official Report on the Newcastle disease program published in February of 1978:

> "[The supplemental indemnity was] designed to reimburse owners for profits they would have realized had their flocks not been depopulated." (Defendant's Exhibit ("DX") 19, p. 23.)
>
> * * * *
>
> "Under the new schedule, poultrymen were paid an initial sum—based, as previously, on the *replacement value* of the bird—*plus* a supplemental indemnity calculated on the *net income* from the sale of eggs the hens would have produced had they not been killed. The supplemental indemnity was paid after an evaluation of the 26-week period following appraisal—the period considered necessary for a poultryman to safely restock and get back into break-even operation." (DX 19, p. 59.) (Emphasis added.)

indemnity to reflect "the then current fair-market-value-cost of obtaining replacement birds," *and* (2) a supplemental indemnity "to reimburse ranchers for egg income lost during repopulation." *Julius Goldman's Egg City* v. *United States*, 214 Ct. Cl. 345, 350, 556 F.2d 1096, 1098 (1977). This two-part standard was adopted by the Secretary *as the measure of fair market value* of the property destroyed.

Although there was some dispute below over the precise figures involved, it was never disputed that the amount ultimately received by Egg City under the initial indemnity fell substantially short of the costs Egg City incurred in replacing its flock, as well as substantially short of the amount Egg City had spent in raising that flock originally. This deficiency was due in part to the obsolescence of the rigid indemnity formula by the time the Egg City birds were destroyed, and in part to the higher costs traditionally incurred by Egg City in raising birds that were healthier and more productive than those at other ranches. It was likewise undisputed that the repopulation of Egg City, though accomplished as quickly as possible, took substantially longer than the 26-week period which the government adopted as the time period it would take for an average-size ranch to restock and then insisted on applying to Egg City. In fact, because there were simply not enough chickens available on the market, it took Egg City more than two years to repopulate its massive flock. As a result, Egg City was never fully compensated for either the cost of replacing its flock or the income it lost until replacement.

These two factors, however—replacement cost and lost income until replacement—are the two elements of "fair market value as determined by the Secretary" for which the statute requires owners to be compensated. It is manifest that the statute and regulations were not complied with in Egg City's case.

Instead of applying those standards to the particular facts of Egg City, the Department of Agriculture used

uniform formulas based on an average ranch that were simply inappropriate for a ranch of Egg City's size and complexity. In doing so, the Department deprived Egg City of the indemnification to which it was entitled under the statute.[5]

It is a settled principle of administrative law that agencies are legally obligated to follow the regulations they adopt. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *United States* v. *Heffner*, 420 F.2d 809, 812 (4th Cir. 1969) (government bound by "News Release"); *Smith* v. *Resor*, 406 F.2d 141, 143-46 (2d Cir. 1969) (binding effect of Army's "Weekly Bulletin"). This obligation exists whether or not the agency was required, either by the Constitution or by statute, to adopt the regulations at issue:

> "While it is of course true that . . . the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, . . . having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them." *Service* v. *Dulles*, 354 U.S. 363, 388 (1957).

This principle was recognized by the Court of Claims when it stated, in denying the respondent's motion for summary judgment, that the Secretary's indemnification of the petitioner could not be upheld if it was arbitrary, capricious, an abuse of discretion, or violative of the stat-

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[5] By rigidly adhering to uniform formulas and refusing to accommodate the particular facts regarding Egg City, the Department of Agriculture violated the specific provisions of its regulations. The regulations governing the appraisal of animals and materials under the exotic Newcastle disease eradication program expressly prohibit the valuation of animals on a group or average basis unless all the animals in the group are of the same value. 9 C.F.R. § 53.3(b). The Agriculture Department ignored that regulation in administering the indemnification program. *See also American-Hawaiian Steamship Co.* v. *United States*, 129 Ct. Cl. 365, 124 F. Supp. 378 (1954), *cert. denied*, 350 U.S. 863 (1955).

utory standard. 214 Ct. Cl. at 354, 556 F.2d at 1100. *Cf.* 5 U.S.C. § 706 (1976).

In summary, pursuant to his statutory authority, the Secretary determined that the proper measure of the fair market value of destroyed commercial laying flocks required payment of both an initial indemnity for replacement costs and a supplemental indemnity for egg income lost until replacement. Having adopted those standards, the Secretary was prohibited from blindly indemnifying Egg City on the basis of rigid formulas applicable to an average rancher. Rather, in applying the articulated standards of the indemnities, he was required to take the individual circumstances and value of Egg City and its flock into account. There can be no dispute in this case that he failed to do so. Accordingly, the writ of certiorari should issue, and the Court should make it clear that the Secretary is required to comply with his announced standards.

II. THE COURTS BELOW IMPROPERLY SUBSTITUTED THEIR OWN DEFINITION OF "FAIR MARKET VALUE" FOR THAT ADOPTED BY THE SECRETARY OF AGRICULTURE

When the Court of Claims denied the government's motion for summary judgment in 1977, it defined the issue to be tried as a straightforward inquiry into whether the Secretary had complied with his announced standards. Specifically, the court wrote:

> "[It is plaintiff's] position that (a) the formula for the initial indemnity was unfair and unrepresentative of fair market value for an operation of plaintiff's large size, and (b) the formula for the supplemental indemnity was likewise improper for Egg City . . . . Plaintiff has the burden of demonstrating the correctness of its allegations but it must be given that opportunity." 214 Ct.Cl. at 355, 556 F.2d at 1101.

The courts below denied Egg City that opportunity. Instead, they abandoned the proper standard of review enunciated in the Court of Claims' original opinion in favor of a different standard that permitted them to disregard the method of measuring fair market value promulgated by the Secretary.

Rather than measure the payments made under the two indemnities by the stated objectives of each, the courts below simply lumped the two indemnity payments together and held that, even if each was inadequate for its intended purpose, the sum nevertheles *seemed to them* to constitute adequate compensation. In other words, the lower courts concluded that the whole exceeded the sum of its parts. The following passage from the opinion of the trial judge describes the standard of review that he adopted and the Court of Appeals approved:

> "The two indemnities paid by the Secretary must be considered together, as a single total, in passing on the fairness of the payment of market value. The plaintiff's tactic of a separate challenge to the formula of each of the two indemnities is rejected. Plaintiff was under the statute not entitled to a logical and sound initial indemnity and, separately, to a similar supplemental indemnity, but to compensation equal to fair market value. It is therefore no matter that the initial indemnity may have been inadequate. The Secretary himself recognized this when he paid the supplemental indemnity. And it misses the point doubly to say, as plaintiff does, that the supplemental indemnity did not fully compensate for the profits lost during the second 26-week period following the appraisal and order for destruction of plaintiff's flock. The supplemental indemnity was intended, as its very name reveals, only to add to the first indemnity, and thereby to pay full compensation. Compensation was not to be paid for lost profits during any particular period; the statute required compensation not for lost profits, but for fair market value, and for that value 'at the time of the

> destruction.' Only the total payment may be attacked as less than the statutory fair market value." (Opinion at 5-6.)

In other words, though neither the initial nor the supplemental indemnity when applied to Egg City was adequate for its intended purpose, the courts below nonetheless found that the total sum received by Egg City did in fact represent the fair market value of the destroyed flock. But fair market value measured by what standard? Absent the standards announced by the Secretary—which required both an adequate initial indemnity and an adequate supplemental indemnity—the courts below lacked any objective standard whatsoever against which to measure fair market value on a combined basis. The Secretary, who had the statutory authority to set the standard of fair market value, never promulgated any such combined standard.[6]

Accordingly, there is nothing in the record reflecting an abstract fair market value for plaintiff's flock unrelated to the principles underlying each of the indemnities. It is simply fallacious to suggest that plaintiff had the burden of demonstrating, without reliance on an analysis of each of the two indemnities, that the aggregate sum received was inadequate compensation for the fair market value of

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[6] Notably, when the Court of Claims denied the government's original motion for summary judgment, it expressly admonished the trial judge not to substitute his own notion of fair market value for that of the Secretary. The Court wrote that the express words of the statute "preclude the court's deciding the issue of 'fair market value' independently and for itself." *Julius Goldman's Egg City* v. *United States*, *supra*, 214 Ct. Cl. at 354, 556 F.2d at 1100. The Court went on to state that "the ultimate standard of decision here will not be the court's own view of 'fair market value' but the propriety of the Secretary's determination under that statutory criterion." 214 Ct. Cl. at 354, 556 F.2d at 1101. Yet the trial judge did decide the issue of fair market value "independently and for himself," and the new Court of Appeals for the Federal Circuit affirmed.

the destroyed flock. The standards by which fair market value was to be measured were expressly incorporated by the Secretary in the two indemnities. To throw out the notion of two separate indemnities not only disregards the standards adopted by the Secretary, but also deliberately deprives a review tribunal of any scale by which reasonableness can be measured.

In reviewing agency action, a court is bound to follow validly promulgated regulations and procedures. It may not substitute its judgment for that of the administrative agency. *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186 (1946). The trial judge erred by doing precisely that, and the Court of Appeals erred when it found that the trial judge's conclusion was reasonable. As the Supreme Court has stated:

> "[I]n providing for judicial review of administrative procedural rule-making, Congress has not empowered district courts to substitute their judgment for that of the agency. * * * The question for decision was whether the exercise of discretion *by the Commission* was within permissible limits, not whether the District Judge's substituted judgment was reasonable." *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279, 290-91 (1965) (emphasis in original).

The writ of certiorari should issue to correct the erroneous standard of review adopted by the lower courts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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April 8, 1983

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 364-75

JULIUS GOLDMAN'S EGG CITY,
Appellant,

v.

THE UNITED STATES,
Appellee.

DECIDED: January 10, 1983

James A. Dobkin argued for appellant. With him on the brief were *Edgar H. Brenner*, *Thomas B. Wilner*, *Thomas D. Fuller*, and *Arnold & Porter.*

Randall B. Weill argued for appellee. With him on the brief was Assistant Attorney General *J. Paul McGrath.*

Before: RICH, *Circuit Judge*, COWEN, *Senior Circuit Judge*, and KASHIWA, *Circuit Judge.*

PER CURIAM.

Appellant appeals from a judgment * of the United States Claims Court dismissing appellant's petition. We affirm.

I

Appelant owned poultry which was destroyed on appellee's order for the purpose of controlling an epidemic

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* Pursuant to order of this court dated October 4, 1982, the United States Claims Court, on October 6, 1982, entered a final judgment in accordance with Trial Judge David Schwartz's recommended decision of January 18, 1982.

of an exotic poultry disease. The exotic disease, Velogenic Viscerotropic Newcastle Disease, first appeared in commerical poultry flocks in southern California in November 1971. When the disease threatened to spread to the whole country, the appellee, through the Secretary of Agriculture (the "Secretary"), on March 14, 1972, acting with statutory authority, declared a national emergency and with the active collaboration of the California health authorities instituted a program to quarantine and destroy the infected flocks and pay the owners the fair market value of their destroyed flocks. 21 U.S.C. §§ 114-114a, 134-134h (1970);[1] 9 C.F.R. §§ 53.1-53.10 (1975).[2]

The flocks in eight affected counties were appraised and destroyed, compensation was paid to the owners, and the

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[1] 21 U.S.C. § 114a, in pertinent part, states:

> The Secretary of Agriculture * * * is authorized to control and eradicate any communicable diseases of livestock or poultry * * * which in the opinion of the Secretary constitute an emergency and threaten the livestock industry of the country, including the payment of claims growing out of destruction of animals (including poultry), and of materials, affected by or exposed to any such disease, in accordance with such regulations as the Secretary may prescribe.

21 U.S.C. § 134a(d), in pertinent part, states:

> [T]he Secretary shall compensate the owner of any animal, carcass, product, or article destroyed pursuant to the provisions of this section. Such compensation shall be based upon the fair market value as determined by the Secretary, of any such animal, carcass, product, or article at the time of the destruction thereof.

[2] 9 C.F.R. § 53.3(b), in pertinent part, states:

> The appraisal of animals shall be based on the fair market value and shall be determined by the meat, egg production, dairy or breeding value of such animals. Animals may be appraised in groups providing they are the same species and type and providing that where appraisal is by the head each animal in the group is the same value per head or where appraisal is by the pound each animal in the group is the same value per pound.

approximately 160 ranches involved were cleaned and disinfected. This was done by a task force of 1500 persons, including veterinarians and agricultural economists, assembled from the Department of Agriculture's Animal and Plant Health Inspection Service and the California Department of Food and Agriculture. The sum paid initially to all the owners, the initial indemnity, came to $17.7 million, and was supplemented by a further payment of $5.6 million, a total of over $23 million.

On September 7, 1972, the appellee determined that appellant's flock had been exposed to the disease. Appellant operated, in Ventura County, California, the largest egg ranch in the world. It housed some 3.4 million of the 11 million chickens destroyed, was 50 times larger than the average ranch, and three times as large as the next largest. Appellant was not only a table-egg enterprise which could produce 900,000 eggs daily, but, unlike other ranches, also had a feed mill, fertilizer plant, laboratories, facilities for breaking, drying and freezing eggs and storing the product, as well as a distribution system which took the eggs directly to retail supermarkets.

The destruction of appellant's flock and the cleaning and disinfection of its premises were completed on December 26, 1972. On February 1, 1973, the appellee permitted the appellant to begin bringing replacement chickens back into its premises. Appellant was paid approximately $5.2 million as an initial indemnity and $2 million as a supplemental indemnity, a total of more than $7.2 million.

In October, 1975, appellant filed a petition in the United States Court of Claims for additional payments of indemnities and for further payments under a contract with the appellee by which the appellant undertook the destruction of its flock and the cleaning and disinfection of its premises. The appellee moved for summary judgment which was denied by that court. *Julius Goldman's*

Egg City v. *United States*, 556 F.2d 1096 (Ct. Cl. 1977). On remand, the lower court (then the trial division of the Court of Claims) dismissed appellant's petition after a trial of the facts.

Appellant now seeks review of the lower court's decision. In addition, appellant seeks to recover interest on the amounts allegedly due and owing to it since 1972.

II

Appellant primarily argues that the trial judge incorrectly substituted his own standards of fair market value [3] for those standards enunciated and adopted by the Secretary. Appellant contends that the Secretary had enunciated and adopted standards for two separate indemnities and the trial judge incorrectly lumped the two indemnities together in a single sum as compensation for the fair market value of its destroyed flock. Appellant believes that the two indemnities should be considered separately—the initial compensation for fair market value of its destroyed flock and the supplemental compensation for lost profits until its flock could be replaced. We disagree. The trial judge correctly held that the two indemnities should be considered as a single total in order to decide whether the Secretary had made a proper determination of the fair market value of the destroyed chickens as required by statute and regulations.

The appellant also contends that the sum of the two indemnities did not adequately compensate it for the fair market value of its destroyed flock. The statute provides that the Secretary "shall" compensate the own-

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[3] Fair market value is generally defined as

> the price at which property would change hands in a transaction between a willing buyer and a willing seller, neither being under compulsion to buy or sell, and both being reasonably informed as to all relevant facts.

Miller v. *United States*, 620 F.2d 812, 825 (Ct. Cl. 1980).

ers of diseased animals, destroyed under the section; and that "[s]uch compensation shall be based upon the fair market value as determined by the Secretary, of any animal * * * at the time of the destruction thereof." 21 U.S.C. § 134a(d) (1970). The fair market value of chickens therefore "shall be determined by the * * * egg production * * * value of such animals." 9 C.F.R. § 53.3(b) (1975).

The Court of Claims has stated on numerous occasions and in particular in its denial of summary judgment in *Julius Goldman's Egg City*, *supra*, at 1100-01, that the Secretary's determination of fair market value

> [is] to be upheld unless it is found to have been arbitrary, capricious, an abuse of discretion, or violative of the statutory standard. * * * [T]he ultimate standard of decision here will not be the court's own view of 'fair market value' but the propriety of the Secretary's determination under the statutory criterion. * * * Plaintiff has the burden of demonstrating the correctness of its allegations.

In assessing the propriety of the Secretary's determination made pursuant to statutory authority, the reviewing court is guided by the

> venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 381 (1969). *See also First Multifund for Daily Income, Inc.* v. *United States*, 602 F.2d 332, 336 (Ct. Cl. 1979), *cert. denied*, 445 U.S. 916 (1980).

A similar standard has been established for the review of an agency's intepretation of its own regulations, that is,

> to sustain an administrative intepretation of a regulation issued by it, it is not necessary to find that the agency construction is the only reasonable one, or even that it is the result a court would have reached had the question arisen in the first instance in judicial proceedings. * * * Where administrative control has been authorized by Congress, the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.

Nabisco, Inc. v. *United States*, 599 F.2d 415, 419 (Ct. Cl. 1979). *See also Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). And, when the Secretary's determination involves the exercise of administrative discretion, the review court must defer to his judgment as to where to draw the lines. The Court of Claims has previously observed in *Nabisco, supra*, at 422, that

> [a]ny such line would be open to criticism. This line-drawing, however, is precisely the task for which administrative agencies, with their special expertise and experience, are peculiarly suited to perform effectively; and it is in deference to that experience and judgment that courts refuse to disturb such determinations except when they are shown to be arbitrary. Here, the indicia chosen by the Secretary seem rational and appropriate, and afford a reasonable basis for the difference in treatment. * * * Even if the court itself might have drawn a different line had the matter been left to us, the Secretary's action was clearly within the scope of discretion granted him by the statute.

In its determination of fair market value, the Secretary found that there was no actual market for chickens of various ages in an egg rancher's flock, but rather only a market for day-old chicks or 20-week old pullets. In light of this fact, the Secretary concluded that $2.00 was a fair market value for an average prime-age 26-week-old chicken, the age an egg-laying chicken becomes profitable.

This was calculated by adding the market price of $1.65 for a 20-week-old pullet to the 35-cent estimated average cost of raising such a pullet to 26 weeks. Although $2.00 was the maximum allowable compensation per chicken, that value was not absolute but rather a guideline for negotiating with the ranchers. The value of $2.00 was adjusted upwards or downwards depending on greater or lesser age of the chicken. Thus, each rancher was paid an indemnity in accordance with an agreement reached on the basis of the guidelines, *i.e.*, the $2.00 value and the adjustments.

There was no showing that the Secretary acted unreasonably in basing the initial indemnity guidelines on the value of the average chicken in light of the several factors involved such as the numbers of chickens involved, the difficulties of any appraisal system, and the recriminations and claims inevitably resulting from a customized appraisal. Since the applicable regulations permit the appraisal of animals in groups, 9 C.F.R. § 53.3(b), the Secretary decided the egg-laying chickens had the same value per head. The valuation of domestic animals such as chickens is a matter the Congress has delegated to the Secretary in light of the Secretary's expertise. *See Nabisco, supra*, at 422. There is no evidence that the Secretary's judgment was wrong. *Red Lion, supra*, at 381.

When egg prices rose following the payment of the initial indemnity, the Secretary concluded that the guidelines for the initial indemnity had been inadequate in compensating for the fair market value of the destroyed chickens. Thus, each rancher was paid a supplemental indemnity that was based on a formula which included the rancher's theoretical lost profits from his flock in the 26 weeks following destruction. The Secretary had calculated that 26 weeks was necessary to raise a chicken to profitable egg-laying age. The appellant believes the supplemental indemnity was a separate payment in com-

pensation of its lost profits until its flock could be replaced. We disagree.

We conclude that the aggregate of the two indemnities provided adequate compensation and that under the statute, the appellant was not entitled to separate indemnities. The law required only that it be paid the fair market value of its flock at the time of the destruction. It did not matter that the initial indemnity may have been inadequate. The supplemental indemnity was not, as advanced by the appellant, to pay for lost profits during the 26-week period following the appraisal and destruction of its flock. Rather, the supplemental indemnity was an adjustment of one element in the initial determination of fair market value, that is, lost profits from egg production during the 26 weeks following destruction. The supplemental indemnity was intended only to add to the first indemnity in order to pay full compensation for the destroyed chickens. The earlier determination of fair market value, resulting in the initial indemnity, included some recognition of lost profits as an element of fair market value, *i.e.*, the values represented by the opportunity to make profits from a chicken. This is evidenced by the guidelines of diminishing value for older chickens, reflecting their decreasing productivity with age. Accordingly, we conclude that the Secretary's determination of the initial and supplemental indemnities was both objective and reasonable. *See United States* v. *564.54 Acres of Land*, 441 U.S. 506, 511 (1979).

Further, the lower court found that the appellant, who was paid an initial indemnity of $5,160,173.97 and a supplemental indemnity of $1,975,255.88 for a sum of $7,135,429.85 as the fair market value of its flock of 3,422,356 chickens, had failed to meet its burden of showing inadequate compensation. In particular, the trial court found the appellant's actual loss was $5,943,462. These findings are supported by the record and we adopt them.

For the reasons previously stated, we conclude that there was a rational basis for the Secretary's determination of the fair market value of appellant's flock, that there was no abuse of discretion lodged in the Secretary, and that there was no violation of the statutory standard.

III

Next, the appellant argues that the Secretary arbitrarily and unreasonably applied to it the compensation standards enunciated and adopted by him. Appellant contends that the Secretary should not have applied the uniform standards which may have been appropriate for the typical poultry rancher but which were inappropriate and inadequate when applied to it.

As to the initial indemnity, the appellant contends the Secretary improperly used a formula that was based on the average values of chickens and not on the merits of individual chickens or flocks. Because it produced its own baby chicks and raised them to 26 weeks while other ranchers bought 20-week-old pullets from baby chick growers, the appellant contends it incurred greater costs in raising a chick to 26 weeks, $2.52 as compared to the $2.00 average. Thus, appellant argues the initial indemnity it received was inadequate to compensate the fair market value of its destroyed flock.

It is well established that the cost to a single entrepreneur is not the equivalent of fair market value. *See United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 406 (1949). Moreover, the appellant has failed to show that its flock had a fair market value greater than the amount paid to it.[4] As previously

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[4] There were no objective data in the record which support appellant's claim that its chickens were more valuable or more productive than average chickens. *See Sternberger* v. *United States*, 401 F.2d 1012, 1016-17 (Ct. Cl. 1968).

stated, there was no showing that the Secretary acted unreasonably in basing the initial indemnity guidelines on the value of the average chicken.

As to the supplemental indemnity, the appellant contends that the Secretary improperly used a formula based on hypothetical lost profits in determining its supplemental indemnity. The supplemental indemnity was calculated on the basis of hypothetical, lost profits from egg production at a typical ranch in the 26-week period following destruction of its flock during which a chicken can be raised to profitable egg-laying age. The appellant contends its flock was so large that it was impossible to repopulate in 26 weeks.

As previously stated, the supplemental indemnity was not intended as a payment of the entire fair market value or as a replacement of all lost profits for egg production following the destruction of the rancher's flock. Rather, the supplemental indemnity was intended as an adjustment or addition to the initial determination of the fair market value, to the extent only of the perceived inadequacy of the earlier payment to compensate for the egg-producing profit element of the fair market value at the time of destruction. Moreover, the statute required only payment of fair market value of the chickens at the time of destruction, not payment of profits after destruction.

Therefore, it was not unreasonable for the supplemental indemnity to be based on the same economic yardstick as the initial indemnity—the 26-week-old chicken. The formulation for the supplemental indemnity was fair. *See Nabisco, supra*, at 422. Moreover, the appellant failed to show it was unable to repopulate its flock in 26 weeks as had others. Again, the Secretary's judgment is entitled to respect in the absence of "compelling indications that it is wrong." *Red Lion, supra*, at 381.

IV

Last, the appellant argues that a constructive change occurred in the contract between the parties when the appellee ordered the appellant to clean and disinfect its manufacturing and support facilities in addition to the "poultry premises" specified in the contract. Appellant argues it is therefore entitled to additional compensation.

The appellant primarily contends that its cleaning and disinfection of other buildings and facilities went beyond the contract phrase "poultry premises" of "Item No. 1" under "Services." [5] Appellant contends the plain meaning of the contract terms required the cleaning and disinfection of only those premises containing poultry. The lower court, however, found numerous references in the contract requiring cleaning and disinfection of appellant's entire premises,[6] "buildings" and "premises." [7] Isolated in-

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[5] Terms of Contract, in pertinent part, state:

SERVICES

ITEM NO. 1

Furnish all personnel, equipment, and services as required for the depopulation of approximately 3,422,400 poultry and the cleaning and disinfection of the *poultry premises*, for the period September 8, 1972 through December 15, 1972, in accordance with the following Terms of Contract. [Emphasis added].

[6] Attachment #1 of Guidelines, in pertinent part, states:

4. Disinfection of Premises, Conveyances, and Materials

All premises, including barns, corral, stockyards, and pens, and all cars, vessels, aircraft, and other conveyances, and the materials therein shall be cleaned and disinfected * * *. [Emphasis added].

[7] Terms of Contract, in pertinent part, state:

5. Buildings prepared for cleaning and disinfection according to the folowing:

* * * *

d. Premises sprayed with USDA approved disinfectant according to Government requirements and as directed by a State-Federal official. Disinfectant to be supplied by Contractor.

stances of the phrase "poultry premises" cannot overcome the force of the repeated references indicating coverage of the entire premises. Contract interpretation has been consistently viewed as a harmonizing process in which the various parts of a disputed contract are to be construed as a whole to give meaning to all of its provisions. In *State of Arizona* v. *United States*, 575 F.2d 855, 863 (1978), the Court of Claims held that

> [w]e follow the established general rules that provisions of a contract must be so construed as to effectuate its spirit and purpose, that it must be considered as a whole and interpreted so as to harmonize and give meaning to all of its provisions, and that an interpretation which gives a reasonable meaning to all parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result.

Moreover, the appellant, when ordered, proceeded to clean and disinfect its entire premises without protest. A principle of contract interpretation is that the contract must be interpreted in accordance with the parties' understanding as shown by their conduct before the controversy. *See Macke Co.* v. *United States*, 467 F.2d 1323, 1325 (Ct. Cl. 1972).

V

Thus, the appellant has failed to make the strong, affirmative showing that is necessary to overcome the presumption of correctness accorded to the lower court's findings of fact. *See Petro-Chem Marketing Co.* v. *United States*, 602 F.2d 959 (Ct. Cl. 1979); *Davis* v. *United States*, 164 Ct. Cl. 612 (1964). Moreover, we hold that the legal conclusions of the lower court are correct as a matter of law. Since this holding is dispositive, we do not consider the issue of interest. The judgment of the Claims Court is affirmed.

AFFIRMED.

IN THE UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 364-75

(Filed: January 18, 1982)

JULIUS GOLDMAN'S EGG CITY

v.

THE UNITED STATES

Fair market value; Judicial review of administrative determination of Secretary of Agriculture; Diseased animals, destruction by Department of Agriculture; Contracts—Construction as fixed price or cost plus; Changes as beyond scope of work.

James A. Dobkin, attorney of record for plaintiff. *Thomas B. Wilner*, Arnold & Porter, of counsel.

Richard J. Webber, with whom was *Assistant Attorney General Alice Daniel*, for defendant. *Elizabeth Langer*, of counsel.

OPINION *

SCHWARTZ, *Trial Judge*: This case arises from the Government's program for the control of an epidemic of exotic Newcastle disease in the poultry egg industry in Southern California in 1972. The proper name of the disease is velogenic viscerotropic Newcastle disease (VVND).

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* The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134(h).

When the disease threatened to spread to the whole country, the Secretary of Agriculture on March 14, 1972, acting with statutory authority, declared a national emergency and with the active collaboration of the California health authorities instituted a program to quarantine and destroy the infected flocks and pay the owners their fair market value. 21 U.S.C. §§ 114-114a, 134-134h (1970)[1]; 9 C.F.R. § 53.3 (1975).

The flocks in the eight affected counties were appraised at the approximately 160 ranches involved, compensation was paid to the owners, and the ranches were cleaned and disinfected. This was done by the task force of 1500 persons, including veterinarians and agricultural economists, assembled from the Department's Animal and Plant Health Inspection Service and the California Department of Food and Agriculture. The sum paid initially, called in the record an indemnity, came to $17.7 million, and was supplemented by a further payment of $5.6 million, a total of over $23 million.

Plaintiff Julius Goldman's Egg City operates, in Ventura County, California, the largest egg ranch in the world. It housed some 3.4 million of the 11 million chickens destroyed, was 50 times larger than the average ranch and three times as large as the next largest. Plaintiff operates not only a table-egg enterprise which can produce 900,000 eggs daily, but, unlike other ranches, also a feed mill, fertilizer plant, laboratories, facilities for breaking, drying and freezing eggs and storing the product, as well as a distribution system which takes the eggs directly to retail supermarkets.

Plaintiff was paid $5.2 million as an initial indemnity, and $2 million as a supplemental indemnity, a total of over $7.2 million. Here, the claim is for inadequate pay-

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[1] A statutory provision for an indemnity for the destruction of diseased animals appears first in the Department of Agriculture Organic Act of 1944, c. 412, Title I, § 101a, 58 Stat. 734 (1944).

ment of both indemnities. Claim is also made for further payments under a contract with the Department of Agriculture by which plaintiff undertook the destruction of its flock (called in the contract "depopulation") and the cleaning and disinfection of its premises.

A government motion for summary judgment was denied by the court, in an opinion determining the standard for the review of the Secretary's determination of fair market value. *Julius Goldman's Egg City* v. *United States*, 214 Ct. Cl. 345, 556 F.2d 1096 (1977). The court held that "the Secretary's determination is to be upheld unless it is found to have been arbitrary, capricious, an abuse of discretion or violative of the statutory standard"; "the ultimate standard of decision here will not be the court's own view of 'fair market value' but the propriety of the Secretary's determination under that statutory criterion." *Id.* at 354, 556 F.2d at 1100-1101. The case was remanded to the trial division for trial of the facts.

The case was tried in both Washington and Los Angeles. The parties have since filed even more than the usual over-voluminous and repetitious proposed findings of fact. These have been culled for relevance and accuracy and the still voluminous product filed as the findings of fact.

On these findings of fact, it is concluded that plaintiff's claims are without merit and that the complaint should be dismissed. This opinion may be regarded as the conclusions of law and fact intermediate between the accompanying findings of fact and the conclusion of law against the plaintiff, on the standard laid down by the court for the review of the Secretary's determinations.

I

Fair Market Value

A The Secretary's Determination of Fair Market Value

The statute provides that the Secretary "shall" compensate the owners of the diseased animals, destroyed under the section; and that "[s]uch compensation shall be based upon the fair market value as determined by the Secretary, of any such animal . . . at the time of the destruction thereof." 21 U.S.C. § 134a(d) (1970). Fair market value of chickens "shall be determined by the . . . egg production . . . value of such animals." 9 C.F.R. § 53.3(b) (1975).[2]

There is no actual market for the chickens of various ages in an egg rancher's flock, but only a market for day-old chicks and for pullets 22 weeks old. The Secretary therefore constructed, from the $1.65 market price of a 22 week-old pullet and the 35-cents estimated average cost of raising such a pullet to 26 weeks, a fair market value of $2.00 for an average prime-age 26-week old chicken. The value was kept at $2.00 for ages near 26 weeks, and adjusted gradually downwards for lesser and greater ages. While $2.00 was the maximum allowable per chicken, the values were not otherwise absolute but rather guidelines for negotiating with ranchers. Ranchers were paid an indemnity in accordance with agreements reached with them on the basis of the guidelines.

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[2] 9 C.F.R. § 53.3(b) (1975) provides:

"The appraisal of animals shall be based on the fair market value and shall be determined by the meat, egg production, dairy or breeding value of such animals. Animals may be appraised in groups providing they are the same species and type and providing that where appraisal is by the head each animal in the group is the same value per head or where appraisal is by the pound each animal in the group is the same value per pound."

When egg prices rose following the payment of the indemnity, the Secretary concluded that the guidelines had been inadequate to pay fair market value and therefore paid a supplemental indemnity, on a formula based upon the rancher's theoretical lost profits from his flock in the 26 weeks after destruction.

B The Claim of Inadequate Compensation For the Fair Market Value

The two indemnities paid by the Secretary must be considered together, as a single total, in passing on the fairness of the payment of market value. The plaintiff's tactic of a separate challenge to the formula of each of the two indemnities is rejected. Plaintiff was under the statute not entitled to a logical and sound initial indemnity and, separately, to a similar supplemental indemnity, but to compensation equal to fair market value. It is therefore no matter that the initial indemnity may have been inadequate. The Secretary himself recognized this when he paid the supplemental indemnity. And it misses the point doubly to say, as plaintiff does, that the supplemental indemnity did not fully compensate for the profits lost during the second 26-week period following the appraisal and order for destruction of plaintiff's flock. The supplemental indemnity was intended, as its very name reveals, only to add to the first indemnity, and thereby to pay full compensation. Compensation was not to be paid for lost profits during any particular period; the statute required compensation not for lost profits, but for fair market value, and for that value "at the time of the destruction." Only the total payment may be attacked as less than the statutory fair market value.

Plaintiff, paid $5,160,173.97 as an initial indemnity and $1,975,255.88 as a supplemental indemnity, or a total of $7,135.429.85 as the fair market value of its flock of 3,422,356 chickens, has not met its burden of proof of showing that it was inadequately compensated for the flock's fair market value. The initial and the supplemen-

tal indemnity, taken together, have not been shown to have been otherwise than the product of a rational, bona fide effort by the Secretary to fix the fair market value. As such, they are not to be disturbed, by the standard for judicial review laid down by the court in its decision on the motion for summary judgment.

There is no evidence in the record showing that plaintiff's flock had a value greater than the $7,135,429.85 paid. Plaintiff urged, as the estimated value of its flock, $7,253,673.09, a sum derived from the costs of the replacement flock in the fiscal years 1973 and 1974, amortized backwards in time, and, alternatively, $6,749,336, a sum derived from the costs of the flock in the year before destruction. Necessarily, these sums are largely the product of allocations to the cost of the flock of percentages of various of plaintiff's overall costs of its several businesses. The first sum, based on replacement costs in the two years following appraisal and destruction, is rejected as too remote from the time of valuation to be a reliable gauge. The second has been reduced, by successful Government challenges to elements of the underlying estimates, to $5,943,462. Having been paid $7.1 million for a flock which cost it $5.9 million, and lacking other acceptable proof of fair market value, plaintiff cannot complain.

C The Separate Challenge to the Initial Indemnity

Plaintiff, unlike all other ranchers, produced its own baby chicks and raised them to 26-week, profitable age. (Other ranchers bought 22-week old pullets from growers who had raised them from baby chicks). Plaintiff incurred costs of $2.52 in raising a 26-week old chicken, as compared with the $2.00 average cost determined by the Secretary in his guidelines for the initial indemnity. Put in terms of the whole flock, plaintiff's costs were $5,943,462, as compared with the $5,160,173.97 paid to it as an initial indemnity.

Plaintiff challenges, not the Secretary's determination in the initial indemnity of the fair market value of the average chicken, but rather the fairness to plaintiff of paying it an initial indemnity based on the fair market value of an average chicken. The ground for the challenge is that plaintiff spent more in raising its chickens and therefore they were superior in value to the average chicken, presumably by the difference between $2.52 and $2.00, or, in terms of damages, by the difference between costs of $5.9 million and initial indemnity of $5.1 million.

The challenge is up to a point well-grounded. Plaintiff gave its chickens if not the best feed and care than at least very good feed and care, better than that of the average chicken whose cost was reflected in the initial indemnity. Also, plaintiff's costs were higher than the costs of the average chicken.

Cost to a single entrepeneur, however, is not the equivalent of market value, either generally or in the circumstances of this case. It is not inconceivable that for reasons of its own, or from causes beyond its control, plaintiff spent amounts on its chickens to a total in excess of their resulting fair market value. It would be profitless to speculate on any such reasons and causes, but it is noteworthy that plaintiff is essentially in a different business than other ranchers. Unlike other ranchers, plaintiff raises its own baby chicks to laying age, maintains, in addition to its table-egg operations, large egg-breaking, drying, freezing and storage facilities which can consume up to 30 percent of plaintiff's maximum daily production of 900,000 eggs, and markets its table eggs directly to retail supermarkets. The difference between plaintiff's costs of $2.52 per chicken and the $2.00 cost of the average chicken or the difference between plaintiff's costs of $5.9 million for its flock and the initial indemnity of $5.1 million is not an acceptable measure of the excess of the fair market value of plaintiff's flock over that of the average flock.

Even if adequacy of compensation were to be measured by the initial indemnity alone and even if plaintiff's chickens indeed had a greater value in the market (assuming there were a market) than the average chicken on whose value the guidelines for the initial indemnity were based, it nevertheless remains that plaintiff has not shown exactly by how much its flock's fair market value exceeded the amount of the initial indemnity or by how much the fair market value of its 26-week old chicken exceeded that of the average such chicken. No evidence was offered, for instance, to show that plaintiff's chickens lay more or better eggs than the average chicken, or that its eggs command higher prices than the eggs of average chickens. Other than the amount paid by the Secretary as a supplemental indemnity, there is no basis in the record—plaintiff's costs having been rejected as such a basis—for the determination of any specific amount by which the initial indemnity, alone, failed to compensate for fair market value.

Finally, there has been no showing that the Secretary acted unreasonably in basing the guidelines for the initial indemnity on the value of an average chicken, in the light of the numbers of chickens involved, the difficulties of any system of appraisal and compensation based on variations in value among chickens and flocks, and the recriminations and claims inevitable from a customized appraisal. The applicable regulations recognize that some animals come in large numbers and may be appraised in groups. 9 C.F.R. § 53.3(b), *supra*, note 2. Essentially, the Secretary decided that the egg-laying chickens, at least in the area of the disease, had, in the words of the regulations, "the same value per head." *Id.* The valuation of domestic animals such as chickens is a matter in the first instance confided by Congress to the Secretary. It is a matter, further, in which the Secretary is presumably expert. His judgment is therefore entitled to respect, in the absence of "compelling indications that it is

wrong" (*Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969)). There are no such indications, much less compelling indications.

There has been no demonstration, much less any compelling demonstration, of error in the administrative determination, except in the unpersuasive fact of plaintiff's greater-than-average costs. So far as can be seen, the Secretary's adjustment of the guidelines to the nature and numbers of the animals involved was not unreasonably achieved by the use of average values. A homely fact learned in the trial of the case is that it is very hard to tell the age of a mature chicken. It is doubtless equally hard to judge the relative merits of chickens of the same age. In any event, plaintiff has not shown that it could have been done, in its case. The Secretary accordingly acted within the scope of his statutory powers in his adoption of standards according to a formula based on average values and not on judgments on the merits of individual chickens or flocks. The separate challenge to the initial indemnity fails.

D The Separate Challenge to the Supplemental Indemnity

The second round of indemnity payments, in which plaintiff was paid $1.9 million, was motivated by the Secretary's conclusion that the rise in egg prices following the destruction of the infected chickens had retroactively shown the initial indemnity to be inadequate in not sufficiently considering lost profits from sales of eggs. The supplemental indemnity was calculated on the basis of the hypothetical, lost profits from egg production, in the 26-week period following destruction of a flock, in which a chicken can be raised to profitable egg-laying age and a ranch thereby repopulated.

There is no merit to the contention that the supplemental indemnity so formulated was unfair as to plaintiff because plaintiff's great size made it impossible for it to repopulate in 26 weeks.

As already noted, the supplemental indemnity was not intended as a payment of entire fair market value or as a replacement of all lost profits from egg production following destruction of the rancher's flock. What had been believed to be a fair market value had earlier been determined and paid, in the initial indemnity. That earlier judgment necessarily included some recognition of lost profits as an element of fair market value, *i.e.*, the values represented by the opportunity to make profits from a chicken, which is, after all, an egg-laying machine. This is evidenced by, among other things, the guidelines for a diminishing value for older chickens, reflecting their decreasing productivity with age.

Thereafter, the initial indemnity was seen to have inadequately recognized the element of lost profits. But, withal, the statute required only payment of fair market value at the time of the destruction of the diseased animals, not payment of profits after destruction, and especially not the profits inflated by the very scarcity created by the destruction.

The supplemental indemnity was thus intended as an increase in the earlier determined payment of fair market value, to the extent only of the perceived inadequacy of the earlier payment to compensate for the egg-producing-profit element of fair market value at the time of destruction. So understood, the supplemental indemnity was not unreasonably based on the same economic unit as the initial indemnity—the 26-week old chicken—by a formula based on the hypothetical time it would take to replace a destroyed flock with 26-week old chickens. In other words, since the supplemental indemnity was intended to remedy a generalized inadequacy in the initial indemnity, it was correct to base it on the same considerations as the initial indemnity. Thus, the supplemental formula could just as well have been a percentage of the initial indemnity.

Any supposition in the supplemental indemnity that a rancher could order baby chicks at the time of the destruction of his flock and in 26 weeks replace the destroyed flock was, it is true, essentially artificial and unrealistic—but it was equally so for all ranchers. It was artificial and unrealistic for several reasons; in fact 29 weeks are needed for the development of a 26-week old chicken—the hatching period is three weeks; the destruction of 11 million egg-laying chickens created a shortage of baby chicks usable for repopulation, and ranchers were faced with an acute shortage of baby chicks.

Moreover, and this most of all made the supposition unrealistic, repopulation with a flock of chickens all of the same 26-week age (or of any other single age) was not the objective of the rancher whose flock has been destroyed. The chickens in such a flock would age equally and in time become an over-age flock, sold off for meat.

The proper laying flock wanted by a rancher is a multi-age group, whose ages vary from 26 weeks to about 110 weeks, from which the oldest chickens are periodically sold for meat and are replaced with 26-week old laying chickens. A rancher could not recreate such a multi-age flock by purchasing the same number of baby chicks or pullets as the chickens destroyed. Instead, a limited number of pullets would be purchased, but not so few as to leave the rancher without eggs to sell, followed by periodic further purchases of chicks and pullets, spaced over a period of time, so that eventually there would be reconstituted a multi-aged flock comparable to the rancher's flock prior to destruction.

This last is what plaintiff did. When its flock was ordered destroyed, it bought 1.4 million pullets (there is a failure to prove the allegation that more were not available), and also ordered further shipments, at intervals, of baby chicks and pullets. Other ranchers tried to do the same, according to their size. All balanced their

need for layers to produce eggs for sale with the objective of a multi-age flock and the state of the market for chicks and pullets.

Plaintiff's troubles were no worse than those of the other ranchers. All necessarily required longer than 26 weeks to repopulate with flocks of the pre-destruction variety of ages. It took plaintiff, in fact, almost three years to re-create its pre-destruction multi-aged flock, and it took 2 years to gather a flock of the same number as before. One year after its birds were ordered destroyed, however, plaintiff was doing almost as well as before, with a flock of 2.3 million laying birds, all 26 weeks or older, but relatively young and so proportionately more productive than the pre-destruction flock of 2.7 million layers, almost a million of which were older birds.

The record gives no basis for the judgment plaintiff seeks—that while others could repopulate in 26 weeks, plaintiff was only able to repopulate its flocks in 52 weeks. There is no showing but that other, smaller ranchers were as far from re-creation of their pre-destruction flocks in 52 weeks as was plaintiff and needed as much time as plaintiff did to re-create a flock with the same age distribution as before.

The challenge to the supplemental indemnity fails, as did the challenge of the initial indemnity.

E Alleged Discrimination in the Administration of the Indemnities

Plaintiff complains that with complete records of the ages of its flock, it was in the first indemnity paid correct amounts based on the recorded ages of its chickens, while other ranchers, without such records, understated or misstated the age of their flocks and so obtained greater payment than they were entitled to. It is true that in the haste and urgency of the first indemnity nego-

tiations, other ranchers were not required to seek out records of age of their flocks. Still, no discrimination against plaintiff was intended and none was accomplished. The Secretary's agents, in the belief that destruction of chickens could not begin until agreement was obtained to appraisals, chose not to delay destruction and thus the suppression of the disease by requiring that records of ages be obtained. Their decision, if not sound legally, was justified by the difficulties to be foreseen—even perhaps resulting in delays in the destruction program—in destroying the chickens without the ranchers' agreement on the amount of compensation.

Nor was there discrimination against plaintiff in the further circumstance that on the discovery of the overstatements or misstatements, in the course of the applications for the more leisurely supplemental indemnity, the Department of Agriculture made no efforts to recover the overpayments of the initial indemnity. Again no discrimination against plaintiff was intended or done. The size of the possible recovery, the time and effort required, relations with the industry and perhaps other considerations were the Secretary's to weigh. His decision is not shown to be unreasonable, and certainly it created no rights in plaintiff. What plaintiff seems to want is equality with other, dishonest ranchers—a judgment for the same amounts as the others made away with. The record does not contain data on the amount of any such award, even if morality permitted.

The next complaint of discrimination is that the appraisers by their own admission occasionally paid "a penny or two more" than the Department's appraisal guidelines, although the maximum was always observed. The appraisers were there to bargain for an agreement they deemed necessary for swift suppression of disease. Their payment of a penny more than the guidelines called for was an administrative judgment which cannot be turned into a claim by others for the same penny. In-

deed, for several age groups of its birds, plaintiff itself was paid a penny or two or three more than the guidelines called for, and as to one group it was paid 10 cents per bird less than the guideline figure. The guide lines were just that—guidelines for a bargained agreement.

Lastly, it was not discrimination against plaintiff to pay four neighboring ranchers additional sums based upon the number of weeks after they were ready to start replacing their destroyed flocks, but were ordered by the task force not to do so until plaintiff's nearby ranch was cleaned and disinfected. In the interest of preventing reinfection, these four ranches were kept from resuming business through no fault of their own, and the Secretary's decision to compensate them was neither unreasonable nor any business of the plaintiff's.

II

The Claims on the Contract

A The Contract—Fixed-Price or Cost-Plus

The contract between plaintiff and the Government, effective as of September 7, 1972, provided that plaintiff should destroy its flock and clean and disinfect its premises, for a payment of $800,000. It is held to be a fixed-price contract. There is no merit in plaintiff's contention that the contract is one for reimbursement of cost plus a profit, that is, a "cost-plus," no-risk contract.

The fixed-price nature of the contract may be seen in the provision which states that the "total cost" of the job is to be $800,000:

> *SERVICES*
>
> *ITEM NO. 1*
>
> Furnish all personnel, equipment, and services as required for the depopulation of approximately 3,422,400 poultry and the cleaning and disinfection of the poultry premises, for the period September 8,

1972 through December 15, 1972, in accordance with the following Terms of Contract.

FOR THE JOB—Total Cost *$800,000.00*

In the clause requiring the submission of a cost breakdown it was stated that the cost breakdown need not be observed "so long as the total contract price is not exceeded":

3. *Breakdown of Costs*

A cost breakdown submitted by the Contractor, Julius Goldman, is attached and forms a part of this contract. There is no prohibition against deviation from amounts within items, or for expenditures under an item *so long as the total contract price is not exceeded* and the purpose for which the funds are used remains within the general intent outlined and documented. [Emphasis added].

The bottom line of the cost breakdown submitted by plaintiff pursuant to the foregoing requirement showed, again, a "Total Cost $800,000."

Repeated confirmations that the contract is a fixed-price contract are found in the following:

1. The contract omitted any reference to a rate of profit, as would have been the case in a cost-plus-profit contract.

2. The contract was not negotiated on the basis of estimated costs, as would have been the case with a cost-plus contract, but on a lump sum basis. In the bargaining, plaintiff asked $900,000, the Government offered $500,000, and agreement was reached on $800,000. The breakdown of costs, required under the paragraph 3 quoted above, was neither requested nor seen by Government until the contract was executed by plaintiff.

3. Plaintiff did not establish an account on its books for the costs of the contract, as it would have done, had the contract been one for reimbursement of costs.

4. No government officer promised plaintiff that it would make a profit or that if it lost money on the contract it would be paid an additional sum.

It appears that Mr. Julius Goldman, the principal of plaintiff, was allowed by the government negotiators to believe that if he lost money he could seek further payments from the Department in Washington, and that the Government would negotiate further. Mr. Goldman did in fact seek further payment on the ground that his costs exceeded the contract price. Officers of the Department considered his claims, could not confirm them, and rejected his requests. The rejection seems to have been justified. On the trial of the case, plaintiff was unable to demonstrate that its costs exceeded $749,743, a sum less than the contract price.

B. The Claimed Change

Plaintiff contends that by the use of the phrase "poultry premises" in "Item No. 1," under "Services," quoted above),[3] the contract limited cleaning and disinfection to the buildings housing the chickens, excluding the cleaning and disinfection of the additional facilities—the hatchery, the feed mill, the fertilizer plant, and the breaking, drying, freezing and storage facilities. On this theory, the cleaning and disinfection of these facilities was a contract change for whose costs, plus a profit, the Government is liable. The contention is rejected, and it

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[3] Another reference to "poultry premises" appears on the cover page of the contract:

> "DEPOPULATION, CLEANING, AND DISINFECTION OF POULTRY PREMISES, in accordance with the attached contract terms, for the USDA, APHIS, Newcastle Disease Headquarters, Riverside, California 92507."

is held that the contract required cleaning and disinfection of all the facilities at plaintiff's ranch.

The obligation of the plaintiff to clean and disinfect the entire premises of its ranch is to be seen in the language, in paragraph 1, Introduction, under Terms of Contract, describing the contract as one for "the complete depopulation of the Julius Goldman Egg City premises, Moorpark, California, due to the existence of exotic Newcastle disease," [4] and in paragraph 5, to the cleaning and disinfection of "Buildings" and "Premises," [5] and, finally, in the references to "All premises * * * and the materials therein." [6]

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[4] "*TERMS OF CONTRACT*

"1. *Introduction*

"This contract is being negotiated for the complete depopulation, cleaning and disinfection of the Julius Goldman Egg City premises, Moorpark, California, due to the existence of exotic Newcastle disease. These services are required by the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Newcastle Disease Headquarters, Riverside, California. This office is responsible for control and prevention of the exotic Newcastle disease which has been declared a national emergency the Secretary of Agriculture."

[5] "5. Buildings prepared for cleaning and disinfection according to the following:

"* * * *

"d. Premises sprayed with USDA approved disinfectant according to Government requirements and as directed by a State-Federal official. Disinfectant to be supplied by Contractor."

[6] "ATTACHMENT #1
"GUIDELINES

"* * * *

"4. Disinfection of Premises, Conveyances, and Materials

"All premises, including barns, corral, stockyards, and pens, and all cars, vessels, aircraft, and other conveyances, and the

The phrase "poultry premises," elsewhere, cannot overcome the force of the repeated references indicating coverage of the entire premises. Only such complete cleaning, moreover, would prevent reinfection.

Plaintiff without protest proceeded to clean and disinfect the entire premises, including the facilities now said to be beyond the scope of the contract. The principle of interpretation of the contract in accordance with the parties' understanding, as shown by their conduct before the controversy arose, *Macke Co.* v. *United States*, 199 Ct. Cl. 552, 556, 467 F.2d 1323, 1325 (1972), reinforces the conclusion that the contract work was the cleaning and disinfection of the entire premises and not just the chicken houses.

The claim of a change is not proven.

III

The Claimed Offsets

In view of the conclusion that plaintiff is not entitled to recovery, the three offsets claimed by the Government need only the most brief mention. They are treated extensively in the accompanying findings of fact.

The first offset claimed is for $649,000, paid by the Government for feed for the chickens awaiting destruction. The contention is that it was inequitable that the Government should pay for feed for chickens whose eggs were yielding plaintiff a profit. But the payment was agreed to by the Government in a bargain in which plaintiff promised a speed-up in depopulation. While the promised speed-up was not fully realized, there is no showing of deliberate slowdown or other breach; when

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materials therein shall be cleaned and disinfected under the supervision of a State-Federal employee whenever necessary for the control and eradication of the disease.

"* * * *"

plaintiff thereafter asked for an extension of time for performance, the Government agreed, and plaintiff completed performance of the contract within the extended time.

The second offset seeks credit for the $21,386 paid to neighboring ranchers who were not allowed to resume business, though ready to do so, until plaintiff had completed the disinfection of its ranch. This episode has already been mentioned in connection with the plaintiff's claims of discrimination in the payment of the indemnities, Part IE above. Plaintiff performed in time the contract to destroy its chickens and clean and disinfect its premises. It cannot be penalized for the consequences of the propinquity between ranches.

The last offset sought is for $152,064, paid by the Government as the cost of replacing rather than disinfecting metal water troughs in the chicken houses. This payment was part of a hard-bargained agreement, not breached. The insinuation of duress on the Government is not proven.

For the foregoing reasons, the complaint is dismissed as without merit.

UNITED STATES COURT OF CLAIMS

No. 364-75

JULIUS GOLDMAN'S EGG CITY

v.

THE UNITED STATES

June 15, 1977

Edgar H. Brenner, Washington, D.C., atty. of record, for plaintiff; James A. Dobkin, Thomas B. Wilner and Arnold & Porter, Washington, D.C., of counsel.

Marc J. Fink, Washington, D.C., with whom was Acting Asst. Atty. Gen., Irving Jaffe, Washington, D.C., for defendant.

Before DAVIS, Judge, SKELTON, Senior Judge, and KASHIWA, Judge.

DAVIS, Judge.

A push for summary judgment is often pressed by one party or the other as a short-cut to by-pass what looms as a long or tedious trial on the facts. But we know that such a short-cut is blocked where there are disputed issues of material fact and the case cannot be decided as a matter of law on the uncontroverted facts. This is just such a litigation. The defendant alone has moved for summary judgment; the plaintiff insists that a trial is needed. Because we find summary judgment inappropriate under the controlling standard, we must remand to the Trial Division to determine most of the contested issues. We decide only (1) a few legal questions now presented, and (2) that the factual issues are sufficiently disputed to call for fact-finding.

The case concerns a lesser-known but far-reaching federal authority. Congress has given the Secretary of Agriculture power "to control and eradicate any communicable diseases of livestock or poultry * * * which in the opinion of the Secretary constitute an emergency and threaten the livestock industry of the country," and has also authorized "the payment [by the Secretary] of claims growing out of the destruction of animals (including poultry), and of materials, affected by or exposed to any such diseases, in accordance with such regulations as the Secretary may prescribe." 21 U.S.C. § 114a. This power is spelled out in more detail in 21 U.S.C. § 134a(a) and (b), including the right to seize, quarantine, and dispose of animals which are found to have been affected with or exposed to any such dangerous or communicable disease. Section 134a(d) of Title 21 provides that (with an exception not now pertinent) "the Secretary shall compensate the owner of any animal, carcass, product, or article destroyed pursuant to the provisions of this section. Such compensation shall be based upon the fair market value as determined by the Secretary, of any such animal, carcass, product, or article at the time of the destruction thereof."

This statutory scheme was invoked in 1971-1973 to eradicate exotic Newcastle disease, a contagious sickness of poultry and other birds, which only very recently came to our shores and first appeared in southern California in 1971. Both the Federal Government and the State of California cooperated to impose quarantines and stamp out the disease, efforts which eventually necessitated the destruction of infected and exposed poultry. On March 14, 1972, the Government took over the eradication program as the State's funds allocated to the project had been exhausted. The Secretary of Agriculture, acting pursuant to the legislation described above, declared a national emergency due to the Newcastle outbreak. With that declaration the Government assumed responsibility

for control of the disease and payment of indemnities pursuant to 9 C.F.R. § 53.3(b)[1] to cover the cost of destroying infected or exposed flocks and cleaning and disinfecting premises.

Plaintiff Julius Goldman's Egg City, a California concern, is the country's largest commercial egg producer with a poultry flock in 1972 of approximately 3,000,000 birds. Between August and September 1972, the Government placed sentinel birds (whose purpose was to detect the presence of Newcastle disease on the ranch) at Egg City. After a number of these birds died, laboratory tests yielded a diagnosis of Newcastle disease. The Government notified Mr. Goldman that his flock was infected and demanded depopulation and disinfection of all buildings and equipment. This was done and plaintiff became entitled to the indemnity contemplated by the statute and the regulations. The regulations (9 C.F.R. § 53.3(a)) established an appraisal system whereby federal and state appraisers evaluated the poultry before depopulation. Under these regulations, one representative from the Department of Agriculture and one from the State of California appraised the flocks on all commercial egg producing ranches. In September 1972 they valued the Egg City chickens. The usual procedure involved counting the number of chickens on a ranch but, with a facility Egg City's size, counting served as a spot check on the numbers carried on the ranch's own books. The Government considered Egg City's records accurate and used them to determine the number and ages of the birds. The

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[1] 9 C.F.R. § 53.3(b) provides:

> The appraisal of animals shall be based on the fair market value and shall be determined by the meat, egg production, dairy or breeding value of such animals. Animals may be appraised in groups providing they are the same species and type and providing that where appraisal is by the head each animal in the group is the same value per head or where appraisal is by the pound each animal in the group is the same value per pound.

number of chickens was multiplied by monetary indemnities based on the Government's view of the then current fair-market-value-cost of obtaining replacement birds of various ages. The appraisers then presented Mr. Goldman with the appraisal and requested his signature so that eradication of the flock could begin.

It is at this juncture that the present dispute between the parties began. Simply put, the Government claims that Mr. Goldman signed-off on the appraisal forms (after asking for and receiving certain increases in appraised value) and that his signature was a binding acceptance of the indemnity amount he was to receive. Plaintiff, however, claims that he clearly expressed disagreement with the completed appraisal (and particularly with the base used to make the evaluation). He says that he signed the forms only because the Government told him that his signature was necessary for commencement of depopulation and, most important, because he was assured by the appraisers that the appraisals were not final and increased indemnification could be sought. Despite Mr. Goldman's repeated requests, the Government has refused to increase plaintiff's indemnification under this phase of the program.

During the summer of 1972 the Government decided that the replacement-cost indemnity (the program's initial phase, just described) did not adequately compensate poultrymen for the egg production value of their flocks. As a result, there was instituted a supplemental indemnity program to reimburse ranchers for egg income lost during repopulation. This supplemental indemnity was designed to cover a 26-week repopulation period—an amount of time plaintiff claims was clearly inadequate if applied to its huge facility. Mr. Goldman also asserts that he consistently protested the application of the 26-week formula to his farm and that he was just as consistently given to understand that his protests would be considered by the Agriculture Department—and that they

were, although always turned down. The defendant, on the contrary, insists that Mr. Goldman accepted this supplemental indemnity as final, without cavil at the time.

After failing to obtain redress from the Department on both the initial and the supplemental indemnity, plaintiff filed this suit. Defendant seeks to guillotine the case before trial on three grounds: (a) there can be no judicial review at all of these indemnity payments; (b) in any event, the defendant's presentation shows conclusively that the program conformed to all requirements of statute and regulation; and (c) under the doctrine of accord and satisfaction, plaintiff accepted both types of indemnity and is now barred from seeking additional compensation.

A.

1. The Government's motion does present one true legal issue not calling for fact-finding—is the plaintiff's monetary claim amenable at all to judicial scrutiny? We are concerned only with the legislative provisions relating to the payment of the indemnity after poultry has been destroyed, not with an effort to prevent, by injunction or suit for declaratory relief, the carrying out of an order of eradication. On the monetary facet we hold that judicial review is available but that plaintiff cannot prevail unless it proves that the administrative computation, as applied to it, was arbitrary, capricious, an abuse of discretion, or contrary to law.

Take first the language of the statute relating to the indemnity. 21 U.S.C. § 114a, *supra*, authorizes "the payment of claims growing out of destruction of animals (including poultry) * * * affected by or exposed to any such disease * * *," and 21 U.S.C. § 134a(d) directs, first, that "the Secretary *shall compensate* the owner of any animal * * * destroyed pursuant to the provisions of this section," and, second, that "[s]uch compensation *shall* be based upon the fair market value as determined

by the Secretary, of any such animal * * * at the time of the destruction thereof" (emphasis added). Thus, the Secretary *must* pay an indemnity if compensable animals are destroyed (*Cumberland v. Dept. of Agriculture*, 537 F.2d 959 (7th Cir. 1976)) and the general standard of payment is expressly prescribed; in a case like this, the Department does not have discretion whether or not to pay nor can it decide for itself that something other than "fair market value" shall be awarded. Also, it is important that there is no explicit provision in the statute (or the regulations) precluding further review, or making the administrative determination final, conclusive, or binding. *Cf. Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 313, 78 S.Ct. 752, 2 L.Ed.2d 788 (1958).[2] The only textual phrase on which the defendant can hang its hat is that the measure of fair market value shall be "as determined by the Secretary." Those words as discussed below, go to show that, to the extent a determination of "fair market value" involves a span of discretion, the court cannot substitute its own discretion for properly exercised administrative discretion. But the language does not carry the further burden of making the Secretary's exercise of his discretion conclusive even though he abuses it, acts arbitrarily or capriciously, or fails to follow the statutory standard by refusing to grant a reasonable fair market value. As often pointed out, judicial review is wholly precluded only if the adminis-

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[2] In some instances of indemnity paid for destroyed corps or animals, Congress has expressly declared that the Agriculture Department's award shall be final. 21 U.S.C. § 103 (indemnity for diseased animals imported into the country); 7 U.S.C. § 150e (compensation for certain crops destroyed because of infestation). *See also* 7 U.S.C. §§ 217a, 610(e), 1385, 1785; 16 U.S.C. §§ 577g, 577g-1.

In general, explicit statutory provisions seeming to preclude judicial review are not common and even when they are used the courts have in many instances found some sort of review appropriate. *See* W. Gellhorn & C. Byse, Administrative Law 217-229 (6th ed. 1974), for a discussion of the cases in this area.

trator enjoys absolute discretion and the determination is totally committed to his judgment. On their face the words of this statute command an award based on something which can reasonably and properly be denominated "fair market value," a general concept long known to the law, with ascertainable outer boundaries and not unlimited in its scope. The statute thus supplies a well-known guideline instead of leaving the Secretary wholly at large.[3]

Nor are we persuaded by any extra-textual indication that it was Congress's purpose to cut off judicial review. *See, e.g., Dunlop v. Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 44 L.Ed.2d 377 (1975); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Moore-McCormack Lines, Inc. v. United States*, 413 F.2d 568, 574-75, 188 Ct.Cl. 644, 655-56 (1969). Though judicial scrutiny is not mentioned in the legislative history, nothing in it states or implies that the Secretary's discretion is unlimited, exclusive or final, or that court review is excluded. Keeping the Secretary within bounds, and within the law, is fully consistent with what was said in Congress.

The defendant points out that the statute's purpose is to give the Secretary continuing authority for disease control and eradication (an authority previously derived

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[3] Questions of fair market value are of course commonplace to the courts and especially to this court under our jurisdiction to hear taking cases, tax claims, Indian claims and patent compensation suits. We are not presented with a case in which there is no law at all to apply (*see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), nor are we involved with special problems such as those presented in cases like *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948), *Panama Canal Co. v. Grace Line, Inc., supra*, and *Curran v. Laird*, 136 U.S. App.D.C. 280, 420 F.2d 122, 129 (1969), where the national defense, foreign affairs, and concomitant presidential powers were at issue. Instead we are concerned with fair market value, a question traditionally considered and reviewed by the courts.

only from annual appropriation bills), allowing him to take swift action to eliminate the inherent dangers of contagious livestock diseases. The argument is that the purpose of the indemnity is not only to compensate the owner but to engender owner cooperation with the Secretary's efforts. Defendant would have us conclude that judicial intervention would improperly replace Secretarial discretion with the court's and thereby reduce severely the Secretary's ability to deal decisively and swiftly (as Congress obviously contemplated) with the disease problem. We can accept the Government's delineation of the legislative aim without drawing the Government's conclusion. To allow judicial oversight of the fixing of the indemnity need not interfere at all with the prompt elimination of diseased animals. Nothing requires or suggests that the final determination of the indemnity should or must precede eradication; indeed, the owners' cooperation may well be enhanced by the knowledge that, if dissatisfied with the award, they will be free to seek court review after destruction of the animals. As we have already pointed out, we have here solely a post-destruction claim for monetary relief, not an application to restrain the contemplated elimination of diseased livestock or poultry.[4]

2. Having decided that some review is permissible, we must face two additional legal problems. The first is the proper standard for that review. Shall the court decide for itself what was the "fair market value" or is the Secretarial determination to be upheld unless it is found to have been arbitrary, capricious, an abuse of discretion, or violative of the statutory standard? The answer lies

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[4] To conduct disease eradication programs, the Secretary, pursuant to 21 U.S.C. § 134a(c), has the authority to declare the existence of an extraordinary emergency, dispose of affected poultry, and recover from owners the costs of any care, handling or disposal incurred. This provision, under the appropriate conditions, gives the Secretary formidable authority to act swiftly and prevent further danger to public health and property even in the face of owner resistance.

in the legislative prescription that "fair market value" is to be "as determined by the Secretary." Those words call for the second standard referred to above, and preclude the court's deciding the issue of "fair market value" independently and for itself. The legislative history speaks regularly of a Secretarial determination and we see no reason to depart from the normal rule that administrative determinations of this type are not to be displaced by judicial determinations made entirely *de novo*. *See, e.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413 *ff.*, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).[5] Nothing which can be called an administrative record was made in the Agriculture Department and therefore we shall have to have a trial in this court,[6] but the ultimate standard of decision here will not be the court's own view of "fair market value" but the propriety of the Secretary's determination under that statutory criterion.

3. The other remaining question is the disposition of the case if it is ultimately decided by the court that the Secretary's determination was improper. The same statutory words and the same principles which preclude the court's determining "fair market value" for itself require that, if the administrative award is overturned, the matter be remanded to the Secretary for a proper award—unless the record made here mandates only one acceptable determination. That is comparable to the practice under the Wunderlich Act, 41 U.S.C. §§ 321-22, and

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[5] Though plaintiff challenges the amount of the departmental award, it does not urge that it was entitled to any procedures other than those followed by Agriculture. Nor does the claimant contend that it is entitled to just compensation in the constitutional sense. It is certainly doubtful that such a claim could stand. *See Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (upholding the destruction, without just compensation, of cedar trees passing on a communicable plant disease).

[6] We hold in Part B, *infra*, that defendant has not shown conclusively, on this summary judgment motion, that the indemnities were proper.

it is appropriate for this case of a nonconstitutional indemnity which Congress has authorized the Secretary to grant.

B.

Defendant's secondary contention is that, if there can be judicial review, the Government has conclusively shown by its presentation on summary judgment that no substantial violation occurred. We cannot accept this argument. Defendant has given us affidavits by government officials and other materials tending to support its position but plaintiff has countered with affidavits by plaintiff's personnel and by a nongovernment expert (who participated in a large portion of the eradication program)[7] maintaining the conflicting position that (a) the formula for the initial indemnity was unfair and unrepresentative of fair market value for an operation of plaintiff's large size, and (b) the formula for the supplemental indemnity was likewise improper for Egg City and was in any event discriminatorily applied without rational basis for the differentiation. Triable issues of fact have been revealed by these opposing presentations. We cannot, of course, resolve such disputed issues on a motion for summary judgment, and a trial must be had (or other fact-finding process followed). Plaintiff has the burden of demonstrating the correctness of its allegations but it must be given that opportunity.

C.

The last defense proffered in the Government's motion is that plaintiff entered into an accord and satisfaction (with the Department of Agriculture) accepting the awarded indemnity in full satisfaction of its claims. This is premised, with respect to the initial indemnity, on the fact that in September 1972 Julius Goldman signed the Government's appraisal forms without reservation or

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[7] Plaintiff has also supplied some documentary materials in support of its position.

written protest.[8] As we have indicated, Mr. Goldman has submitted an affidavit swearing that (1) he had protested to the appraisers the bases used for the appraisal of Egg City's flocks, (2) the appraisers answered that they had no authority to change the bases even if Goldman were correct, (3) the appraisers also "told me not to worry about signing the appraisal forms. They explained that the forms had to be signed to get work under way, but that the appraisals were not final. They explained that this was an emergency program and that speed was essential. They said they couldn't wait to negotiate the correct value of the birds at that point, but that the appraisal guidelines were being reconsidered and would be changed, and I would have the right to seek increased indemnification later. They also told me that discussions were under way to pay indemnification for lost income for the time I would be out of business. Based on these representations and on my trust in the Government, I signed the forms to authorize them to destroy the poultry." [9]

As for the supplemental indemnity, Goldman signed the same type of statement. His affidavit sets forth this version of the sequence of events: In February 1973, after repopulation had begun at Egg City, he visited Dr. Sharman, the official then in charge of Newcastle eradication. When Goldman informed Sharman that more than 26

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[8] The statement signed by Mr. Goldman said: "I certify that I own or am authorized to represent the owner of the animals or materials identified in this claim. I make claim for all amounts due me in accordance with all applicable laws and regulations governing the payment of indemnities for the animals or materials identified and to be destroyed because of the disease specified. I further agree to slaughter of said animals and accept the appraisal value for each."

[9] Mr. Goldman also said in his affidavit that "I made clear to them [the appraisers] that I did not agree to the values assigned to the birds in those forms, and that I would continue after signing those forms to claim increased indemnification to reflect the true value of the birds. They [the appraisers] understood that."

weeks (the Government's base for calculating the supplemental indemnity) would be needed for Egg City's repopulation, the latter told him to make a written request for an extension. Plaintiff thereupon wrote to Dr. Sharman requesting both an extension of the supplemental indemnity period and an increase in initial indemnity payments. A month later plaintiff received a reply (from another Government official) denying its requests and stating that the indemnification procedures had to be applied uniformly to all ranchers. Mr. Goldman again contacted Dr. Sharman and asserts that he was reassured that plaintiff's requests were still under consideration. On March 30, 1973, plaintiff again approached Dr. Sharman about the supplemental indemnity and stated that it needed those additional funds to repopulate the ranch. Mr. Goldman avers that Dr. Sharman said that the funds could only be released if Goldman signed the appropriate forms but that the signed forms would not bar further requests for increased indemnification. Mr. Goldman signed and continued to press his claims, meeting with Government officials who allegedly assured him that his application for more funds was still under consideration. Finally, on July 19, 1973, a Dr. Saulmon told plaintiff (repeating the Government's earlier rationale) that the claims had to be denied because the indemnification formulas applied uniformly to all depopulated ranches. Goldman, however, continued to pursue his claims. Through government records obtained under the Freedom of Information Act, he discovered that other nearby ranches had been given a repopulation period of more than 26 weeks, extensions based on the time required to depopulate, clean and disinfect Egg City. Armed with this information, Mr. Goldman wrote to Agriculture Secretary Butz, accusing the Department of inequitable treatment toward Egg City. A meeting with Assistant Secretary of Agriculture Feltner was arranged to review Goldman's claims for more money and two months later, on September 29, 1975, Feltner denied plaintiff's requests.

On the basis of these averments in Mr. Goldman's affidavit, plaintiff urges that, for neither the initial nor the supplemental indemnity, was there an accord and satisfaction because the Government (a) assured Egg City that signing the forms would not bar it from pursuing its claims, (b) actually considered plaintiff's claims on their merits well after the forms were signed, and (c) was aware that plaintiff did not intend to relinquish its claims by signing the appraisal forms.

We think that, here too, triable issues of fact—relevant issues of fact—have definitely been raised by Goldman's affidavit. If plaintiff is proven correct in its factual predicates, there will have been no accord and satisfaction. This court has said that even a general release will not prevail "where the conduct of the parties in continuing to consider a claim after the execution of the release makes plain that they never construed the release as constituting an abandonment of the claims" (*J. G. Watts Constr. Co. v. United States*, 161 Ct.Cl. 801, 807 (1963)), and that claims included in a release are gone "unless by its conduct the Government indicates a willingness to entertain them regardless of the release." *Adler Constr. Co. v. United States*, 423 F.2d 1362, 1365, 191 Ct.Cl. 607, 613 (1970), *cert. denied*, 400 U.S. 993, 91 S.Ct. 461, 27 L.Ed.2d 441 (1971). In *Inland Trucking Corp. v. United States*, 281 F.2d 457, 460, 150 Ct.Cl. 642, 647 (1960), the court ruled that signature of a form referring to "complete and final settlement of the contractor's claim" did not bar recovery where "plaintiff in fact did protest the deductions [orally]" and "did not intend to waive its protest or abandon its claim when it accepted final payment and the defendant's representatives so understood." *See, also, Northern Helex Co. v. United States*, 455 F.2d 546, 555, 197 Ct.Cl. 118, 132-33 (1972). Consideration of such oral assurances by defendant's representatives would not be precluded by the parol evidence rule since plaintiff's proof would (if credited) show that the unclear and

less-than-explicit appraisal forms were not meant as fully integrated and self-contained instruments, and therefore that Goldman's agreement to "accept the appraisal value" for each type of poultry was not intended to preclude additional monetary claims. *See* Restatement (Second) of Contracts § 240 (Tent. Draft No. 6, 1971); *Nippon Hodo Co. v. United States*, 160 F.Supp. 501, 502, 142 Ct.Cl. 1, 4 (1958); *L. W. Packard & Co. v. United States*, 66 Ct.Cl. 184, 192 (1928); *Murray v. Lichtman*, 119 U.S.App.D.C. 250, 339 F.2d 749, 751 (1964).

We add one caveat. To be taken into account the oral assurances by federal personnel on which plaintiff relies must not have been beyond the authority of those who spoke them. *See Richards & Associates v. United States*, 177 Ct.Cl. 1037, 1051 (1966). But this authority need not be express; it may be implied from the scope of the work delegated to the official or employee, as well as the level and nature of his activities. *See, e.g., Centre Mfg. Co. v. United States*, 392 F.2d 229, 236, 183 Ct.Cl. 115, 127-28 (1968) (plurality opinion).

In addition to its factual arguments, plaintiffs asks us to pretermit any inquiry into the circumstances in which it signed the appraisal forms by following a number of the court's decisions in which a claimant was allowed to recover under a statute even though he had some sort of consensual arrangement with the Government which seemed to provide for less than the statute called for.[10]

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[10] Plaintiff cites: *American Export Isbrandtsen Lines, Inc. v. United States*, 499 F.2d 552, 578, 204 Ct.Cl. 424, 468 (1974); *South Puerto Rico Sugar Co. Trading Corp. v. United States*, 334 F.2d 622, 167 Ct.Cl. 236 (1964), *cert. denied*, 379 U.S. 964, 85 S.Ct. 654, 13 L.Ed.2d 558 (1965); *American President Lines, Ltd. v. United States*, 291 F.2d 931, 936, 154 Ct.Cl. 695, 705 (1961); *Suwannee S. S. Co. v. United States*, 279 F.2d 874, 150 Ct.Cl. 331 (1960); *Southeastern Oil Florida, Inc. v. United States*, 119 F.Supp. 731, 127 Ct.Cl. 409 (1953), *cert. denied*, 348 U.S. 834, 75 S.Ct. 56, 99 L.Ed. 658 (1954); *A. H. Bull S. S. Co. v. United States*, 108 F.Supp. 95, 123 Ct.Cl. 520 (1952).

However, we do not accept this invitation to decide at this time that in no foreseeable circumstances would plaintiff be precluded from showing that it failed to receive statutory "fair market value." That issue will not arise if plaintiff succeeds in its factual contentions as to the signing of the forms.[11] But even if Egg City does not prevail on those points, the particular facts found by the Trial Division may well have a significant bearing on Egg City's entitlement to any further recovery which can be shown under the statute—for example, whether plaintiff should be held to have waived its statutory rights under conditions which make that waiver binding on it. We leave this matter to the trial judge to consider, if it becomes necessary, in the light of all the facts he finds.

For these reasons, we deny the defendant's motion for summary judgment and remand the case to the Trial Division for further proceedings consistent with this opinion.

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[11] Nor will the issue be important if the defendant prevails on the merits of the claim.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 364-75

JULIUS GOLDMAN'S EGG CITY,
Appellant,

v.

THE UNITED STATES,
Appellee.

JUDGMENT

On Appeal from the United States Claims Court

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

ENTERED BY ORDER OF THE COURT
GEORGE E. HUTCHINSON
Clerk

/s/ George E. Hutchinson
Clerk

DATED January 10, 1983

UNITED STATES CLAIMS COURT

No. 364-75

JULIUS GOLDMAN'S EGG CITY

v.

THE UNITED STATES

ORDER

Pursuant to the order of the United States Court of Appeals for the Federal Circuit, issued October 4, 1982, IT IS ORDERED that judgment is to be entered in accordance with my report, filed January 18, 1982, recommending a decision to the judges of the United States Court of Claims.

/s/ David Schwartz
DAVID SCHWARTZ
Judge

JUDGMENT

Pursuant to the above and Rule 58, IT IS ORDERED AND ADJUDGED that judgment is entered this date in this case as provided above.

/s/ Frank T. Peartree
FRANK T. PEARTREE
Clerk

Oct. 6, 1982

§ 114. Regulations for suppression of diseases; cooperation of States and Territories

It shall be the duty of the Secretary of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of pleuropneumonia and other dangerous, contagious, infectious, and communicable diseases, and to certify such rules and regulations to the executive authority of each State and Territory, and invite said authorities to cooperate in the execution and enforcement of the provisions of sections 111, 112, 113 to 114a—1, 115, 117 to 120, and 130 of this title. Whenever the plans and methods of the Secretary of Agriculture shall be accepted by any State or Territory in which pleuropneumonia or other contagious, infectious, or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Secretary of Agriculture, and whenever the governor of a State or other properly constituted authorities signify their readiness to cooperate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of said sections, the Secretary of Agriculture is authorized to expend so much of the money appropriated for carrying out the provisions of said sections as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another.

§ 114a. Control and eradication of diseases; cooperation of States and farmers' associations; purchase and destruction of diseased animals; definition of State

The Secretary of Agriculture, either independently or in cooperation with States or political subdivisions

thereof, farmers' associations and similar organizations, and individuals, is authorized to control and eradicate any communicable diseases of livestock or poultry, including, but not limited to, tuberculosis and paratuberculosis of animals, avian tuberculosis, brucellosis of domestic animals, southern cattle ticks, hog cholera and related swine diseases, scabies in sheep and cattle, dourine in horses, scrapie and blue tongue in sheep, incipient or potentially serious minor outbreaks of diseases of animals, and contagious or infectious diseases of animals (such as foot-and-mouth disease, rinderpest, and contagious pleuropneumonia) which in the opinion of the Secretary constitute an emergency and threaten the livestock industry of the country, including the payment of claims growing out of destruction of animals (including poultry), and of materials, affected by or exposed to any such disease, in accordance with such regulations as the Secretary may prescribe. As used in this section, the term "State" includes the District of Columbia, Puerto Rico, and the Territories and possessions of the United States.

§ 134. Definitions

As used in sections 134 to 134h of this title unless the context indicates otherwise—

(a) The term "Secretary" means the Secretary of Agriculture.

(b) The term "animals" means all members of the animal kingdom including birds, whether domesticated or wild, but not including man.

(c) The term "United States" means the States, Puerto Rico, Guam, the Virgin Islands of the United States, and the District of Columbia.

(d) The term "interstate" means from a State or other area included in the definition of "United States" to or through any other State or other such area.

§ 134a. Seizure, quarantine, and disposal of livestock or poultry to guard against introduction or dissemination of communicable disease—Authority of Secretary

(a) The Secretary, whenever he deems it necessary in order to guard against the introduction or dissemination of a communicable disease of livestock or poultry, may seize, quarantine, and dispose of, in a reasonable manner taking into consideration the nature of the disease and the necessity of such action to protect the livestock or poultry of the United States: (1) any animals which he finds are moving or are being handled or have moved or have been handled in interstate or foreign commerce contrary to any law or regulation administered by him for the prevention of the introduction or dissemination of any communicable disease of livestock or poultry; (2) any animals which he finds are moving into the United States, or interstate, and are affected with or have been exposed to any communicable disease dangerous to livestock or poultry; and (3) any animals which he finds have moved into the United States, or interstate, and at the time of such movement were so affected or exposed.

Determination of extraordinary emergency due to dangerous communicable disease; seizure, quarantine, and disposal of animals; action authorized only if adequate measures not taken by State or other jurisdiction; notice to State or other jurisdiction

(b) Whereas the existence of any dangerous, communicable disease of livestock or poultry, such as foot-and-mouth disease, rinderpest, or European fowl pest, on any premises in the United States would constitute a threat to livestock and poultry of the Nation and would seriously burden interstate and foreign commerce, whenever the Secretary determines that an extraordinary emergency exists because of the outbreak of such a disease anywhere in the United States, and that such outbreak threatens

the livestock or poultry of the United States, he may seize, quarantine, and dispose of, in such manner as he deems necessary or appropriate, any animals in the United States which he finds are or have been affected with or exposed to any such disease and the carcasses of any such animals and any products and articles which he finds were so related to such animals as to be likely to be a means of disseminating any such disease: *Provided*, That action shall be taken under this subsection only if the Secretary finds that adequate measures are not being taken by the State or other jurisdiction. The Secretary shall notify the appropriate official of the State or other jurisdiction before any action is taken in any such State or other jurisdiction pursuant to this subsection.

Notice to owner to quarantine or to dispose of animal, carcass, product, or article; action on failure to comply; costs

(c) The Secretary in writing may order the owner of any animal, carcass, product, or article referred to in subsection (a) or (b) of this section, or the agent of such owner, to maintain in quarantine and to dispose of such animal, carcass, product, or article in such manner as the Secretary may direct pursuant to authority vested in him by such subsections. If such owner or agent fails to do so after receipt of such notice, the Secretary may take action as authorized by said subsections (a) and (b) and recover from such owner or agent the reasonable costs of any care, handling, and disposal incurred by the Secretary in connection therewith. Such costs shall not constitute a lien against the animals, carcasses, products, or articles involved. Costs collected under this section shall be credited to the current appropriation for carrying out animal disease and control activities of the Department.

Compensation of owner; fair market value; payments from State or other source; availability of funds

(d) Except as provided in subsection (e) of this section, the Secretary shall compensate the owner of any animal, carcass, product, or article destroyed pursuant to the provisions of this section. Such compensation shall be based upon the fair market value as determined by the Secretary, of any such animal, carcass, product, or article at the time of the destruction thereof. Compensation paid any owner under this subsection shall not exceed the difference between any compensation received by such owner from a State or other source and such fair market value of the animal, carcass, product, or article. Funds in the Treasury available for carrying out animal disease control activities of the Department of Agriculture shall be used for carrying out this subsection.

Restriction on payment of compensation in cases of violation of law or regulation

(e) No such payment shall be made by the Secretary for any animal, carcass, product, or article which has been moved or handled by the owner thereof or his agent knowingly in violation of a law or regulation administered by the Secretary for the prevention of the interstate dissemination of the communicable disease, for which the animal, carcass, product, or article was destroyed or a law or regulation for the enforcement of which the Secretary enters or has entered into a cooperative agreement for the control and eradication of such disease, or for any animal which has moved into the United States contrary to such law or regulation administered by the Secretary for the prevention of the introduction of a communicable disease of livestock or poultry.

§ 134b. Regulations for clean and sanitary movement of animals

The Secretary, in order to protect the health of the livestock or poultry of the Nation, may promulgate regulations requiring that railway cars; vessels; airplanes; trucks; and other means of conveyance; stockyards; feed, water, and rest stations; and other facilities, used in connection with the movement of animals into or from the United States, or interstate, be maintained in a clean and sanitary condition, including requirements for inspection, cleaning, and disinfection.

§ 134c. Regulations for movement of animals affected or exposed to communicable disease

The Secretary is authorized to promulgate regulations prohibiting or regulating the movement into the United States of any animals which are or have been affected with or exposed to any communicable animal disease, or which have been vaccinated or otherwise treated for any such disease, or which he finds would otherwise be likely to introduce or disseminate any such disease, when he determines that such action is necessary to protect the livestock or poultry of the United States.

§ 134d. Inspections and seizures; issuance of warrants

Employees of the Department of Agriculture designated by the Secretary for the purpose, when properly identified, shall have authority (1) to stop and inspect, without a warrant, any person or means of conveyance, moving into the United States from a foreign country, to determine whether such person or means of conveyance is carrying any animal, carcass, product, or article regulated or subject to disposal under any law or regulation administered by the Secretary for prevention of the introduction or dissemination of any communicable animal disease; (2) to stop and inspect, without a warrant, any

means of conveyance moving interstate upon probable cause to believe that such means of conveyance is carrying any animal, carcass, product, or article regulated or subject to disposal under any law or regulation administered by the Secretary for the prevention of the introduction or dissemination of any communicable animal disease; and (3) to enter upon, with a warrant, any premises for the purpose of making inspections and seizures necessary under such laws and regulations. Any Federal judge, or any judge of a court of record in the United States, or any United States commissioner, may, within his jurisdiction, upon proper oath or affirmation indicating probable cause to believe that there is on certain premises any animal, carcass, product, or article regulated or subject to disposal under any law or regulation administered by the Secretary for the prevention of the introduction or dissemination of any communicable animal disease, issue warrants for the entry upon such premises and for inspections and seizures necessary under such laws and regulations. Such warrants may be executed by any authorized employee of the Department of Agriculture.

§ 134e. Penalties; enforcement provisions

(a) Whoever knowingly violates any regulation promulgated pursuant to the provisions of sections 134 through 134d of this title shall be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both.

(b) The Secretary may bring an action to enjoin the violation of, or to compel compliance with, any regulation promulgated or order issued under said sections, or to enjoin any interference by any person with an employee of the Department of Agriculture in carrying out any duties under said sections, whenever the Secretary has reason to believe that such person has violated, or is

about to violate, any such regulation or order, or has interfered, or is about to interfere, with any such employee. Such action shall be brought in the United States district court, or the United States court of any Territory or possession, for the judicial district in which such person resides or transacts business or in which the violation, omission, or interference has occurred or is about to occur. Process in such cases may be served in any judicial district wherein the defendant resides or transacts business or wherever the defendant may be found, and subpenas for witnesses who are required to attend the court in any judicial district in any such cases may run into any other judicial district.

§ 134f. Promulgation of regulations

The Secretary is authorized to issue such regulations as he deems necessary to carry out the provisions of sections 134 to 134h of this title.

§ 134g. Authority in addition to other laws; repeal of inconsistent provisions

The authority conferred by sections 134 to 134h of this title shall be in addition to authority conferred by other statutes. Any provision of any other Act inconsistent with the provisions of sections 134 to 134h of this title is repealed.

§ 134h. Separability of provisions

If any provision of sections 134 to 134h of this title or application thereof to any person or circumstances is held invalid, the remainder of sections 134 to 134h of this title and the application of such provision to other persons and circumstances shall not be affected thereby.

PART 53—FOOT-AND-MOUTH DISEASE, PLEUROPNEUMONIA, RINDERPEST, AND CERTAIN OTHER COMMUNICABLE DISEASES OF LIVESTOCK OR POULTRY

§ 53.1 Definitions.

Words used in this part in the singular form shall be deemed to import the plural and vice versa, as the case may demand. Unless otherwise clearly indicated by the context, whenever the following words, names, or terms are used in the regulations in this part, they shall be construed, respectively, to mean:

(a) "Department" means the United States Department of Agriculture.

(b) "Secretary" means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in his stead.

(c) "Veterinary Services" means the Veterinary Services unit of the Animal and Plant Health Inspection Service, United States Department of Agriculture.

(d) "Veterinary Services employee" means any inspector or other individual employed in the division who is authorized by the Deputy Administrator, Veterinary Services to do any work or perform any duty in connection with the control and eradication of disease.

(e) "Inspector in charge" means an inspector of Veterinary Services who is designated by the Deputy Administrator, Veterinary Services to take charge of work in connection with the control and eradication of disease as defined in this section.

(f) "Disease" means foot-and-mouth disease, rinderpest, contagious pleuropneumonia, or any other communicable disease of livestock or poultry which in the opinion

of the Secretary constitutes an emergency and threatens the livestock industry of the country; or any other communicable disease of livestock or poultry referred to in this paragraph:

The communicable disease of poultry presently existing in the States of California, Florida, New Mexico, and Texas and diagnosed as exotic Newcastle-disease, at the time of slaughter, on the basis of clinical or laboratory evidence, by a Veterinary Services employee or a representative of the particular State involved.

(g) "Materials" means parts of barns or other structures, straw, hay, and other feed for animals, farm products or equipment, clothing, and articles stored or contained in or adjacent to barns or other structures.

(h) "Person" means natural person, firm, partnership, corporation, company, society, and association, and every officer, agent, or employee thereof.

(i) "State" means each and every one of the States of the United States, the District of Columbia, and the Territories and possessions of the United States.

(j) "Mortgage" means any mortgage, lien or other security or beneficial interest held by any person other than the one claiming indemnity.

(k) "Animals"—Livestock, poultry, and all other members of the animal kingdom including birds whether domesticated or wild, but not including man.

§ 53.2 Determination of existence of disease; agreements with States.

(a) The Director of Division is hereby authorized to invite the proper State authorities to cooperate with the Department in the control and eradication of any disease within the meaning of § 53.1 (f)

(b) Upon agreement of the authorities of the State to enforce quarantine restrictions and orders and directives

properly issued in the control and eradication of such a disease, the Director of Division is hereby authorized to agree, on the part of the Department, to cooperate with the State in the control and eradication of the disease, and to pay 50 percent (and in the case of exotic Newcastle disease up to 100 percent) of the expenses of purchase, destruction and disposition of animals and materials required to be destroyed because of being contaminated by or exposed to such disease: *Provided, however,* That if the animals were exposed to such disease prior to or during interstate movement and are not eligible to receive indemnity from any State, the Department may pay up to 100 percent of the purchase, destruction, and disposition of animals and materials required to be destroyed: *Provided, further,* That the cooperative program for the purchase, destruction, and disposition of birds shall be limited to birds as referred to in § 82.2(a) of this chapter, and which are identified in documentation pursuant to Cooperative Agreements,[1] as constituting a threat to the poultry industry of the United States: *And provided further,* That the Secretary may authorize other arrangements for the payment of such expenses upon finding that an extraordinary emergency exists.

§ 53.3 Appraisal of animals or materials.

(a) Animals affected by or exposed to disease, and materials required to be destroyed because of being contaminated by or exposed to disease shall be appraised by a Veterinary Services employee and a representative of the State jointly, or, if the State authorities approve, by a Veterinary Services employee alone.

(b) The appraisal of animals shall be based on the fair market value and shall be determined by the meat, egg production, dairy or breeding value of such animals.

[1] Agreements between the Departments and the particular State involved relating to cooperative animal (including poultry) disease prevention, control, and eradication.

Animals may be appraised in groups providing they are the same species and type and providing that where appraisal is by the head each animal in the group is the same value per head or where appraisal is by the pound each animal in the group is the same value per pound.

(c) Appraisals of animals shall be reported on forms furnished by Veterinary Services. Reports of appraisals shall show the number of animals of each species and the value per head or the weight and value by pound.

(d) Appraisals of materials shall be reported on forms furnished by Veterinary Services. Reports of appraisals of materials shall, when practicable, show the number, size or quantity, unit price, and total value of each kind of material appraised.

§ 53.4 Destruction of animals.

(a) Animals affected by or exposed to disease shall be killed promptly after appraisal and disposed of by burial or burning, unless otherwise specifically provided by the Deputy Administrator, Veterinary Services in extraordinary circumstances.

(b) The killing of animals and the burial, burning, or other disposal of carcasses of animals pursuant to the regulations in this part shall be supervised by a Veterinary Services employee who shall prepare and transmit to the Deputy Administrator, Veterinary Services a report identifying the animals and showing the disposition thereof.

§ 53.5 Disinfection or destruction of materials.

(a) In order to prevent the spread of disease, materials contaminated by or exposed to disease shall be disinfected: *Provided, however,* That in all cases in which the cost of disinfection would exceed the value of the materials or disinfection would be impracticable for any rea-

son, the materials shall be destroyed, after appraisal as provided in § 53.3.

(b) The disinfection or destruction of materials under this section shall be under the supervision of a Veterinary Services employee who shall prepare and transmit to the Deputy Administrator, Veterinary Services a certificate identifying all materials which are destroyed, showing the disposition thereof.

§ 53.6 Disinfection of animals.

Animals of species not susceptible to the disease for which a quarantine has been established, but which have been exposed to the disease, shall be disinfected when necessary by such methods as the Deputy Administrator, Veterinary Services shall prescribe from time to time.

§ 53.7 Disinfection of premises, conveyances, and materials.

All premises, including barns, corrals, stockyards and pens, and all cars, vessels, aircraft, and other conveyances, and the materials thereon, shall be cleaned and disinfected under supervision of a Veterinary Services employee whenever necessary for the control and eradication of disease. Expenses incurred in connection with such cleaning and disinfection shall be shared according to the agreement reached under § 53.2 with the State in which the work is done.

§ 53.8 Presentation of claims.

Claims for (a) compensation for the value of animals, (b) cost of burial, burning or other disposition of animals, (c) the value of material destroyed, and (d) the expenses of destruction, shall each be presented, through the inspector in charge, to Veterinary Services on separate vouchers in form approved by the Deputy Administrator, Veterinary Services.

§ 53.9 Mortgage against animals or materials.

When animals or materials have been destroyed pursuant to the requirements contained in this part, any claim for indemnity shall be presented on forms furnished by Veterinary Services on which the owner of the animals or materials shall certify that the animals or materials covered thereby, are, or are not, subject to any mortgage as defined in this part. If the owner states there is a mortgage, forms furnished by Veterinary Services shall be signed by the owner and by each person holding a mortgage on the animals or materials, consenting to the payment of any indemnity allowed to the person specified thereon.

§ 53.10 Claims not allowed.

(a) The Department will not allow claims arising under the terms of this part if the payee has not complied with all quarantine requirements.

(b) Expenses for the care and feeding of animals held for destruction will not be paid by the Department, unless the payment of such expense is specifically authorized or approved by the Deputy Administrator, Veterinary Services.

(c) The Department will not allow claims arising out of the destruction of animals or materials unless they shall have been appraised as prescribed in this part and the owners thereof shall have executed a written agreement to the appraisals.

UNITED STATES DEPARTMENT OF AGRICULTURE
STATE-FEDERAL NEWCASTLE DISEASE HEADQUARTERS
1150 University Avenue
Riverside, California 92507
Phone: 714-684-9351

FOR IMMEDIATE RELEASE

NEWCASTLE TASK FORCE OUTLINES PROPOSED INDEMNITY FORMULA CHANGES:

RIVERSIDE, Oct. 9—State-Federal Newcastle Task Force officials today released further details on proposed changes in the indemnity schedule used to compute payments to poultrymen whose egg laying flocks have been destroyed because of exotic Newcastle disease.

The new indemnity schedule is designed to reimburse poultrymen for lost income from the sale of eggs their birds would have produced had they not been killed. The plan was announced Thursday (Oct. 5) in Sacramento by U.S. Department of Agriculture Earl L. Butz.

A 26 week period, following the appraisal of a flock, is used as the basis for the new indemnity formula. This is considered the time period it will take a poultryman to safely restock and get back into break-even operation.

Under the formula, the potential productivity of the destroyed flock during the 26 weeks and the average prices paid for various egg sizes during that period are used to compute the additional indemnity. Costs of production during the period will also be taken into account. Task Force officials point out that the supplemental indemnity will only be paid if actual egg prices average higher than the cost of production.

The initial indemnity paid for the birds at the time of their destruction will remain the same under the new formula, said Task Force officials. Currently this indemnity is set at a ceiling of $2.00 per bird for prime layers, about 26 to 30 weeks of age.

Application of the new indemnity schedule is retroactive to March 14, when Secretary Butz declared the southern California exotic Newcastle disease outbreaks a national emergency. This means that flock owners who had birds destroyed since the declaration of the emergency may be eligible for additional indemnities based on the new formula.

Actual egg prices during the 26-week periods will be determined from quoted sources, Task Force officials said. Data to determine the potential productivity of layers during the period, as well as the costs of production, have been supplied to the Task Force by the California Agricultural Extension Service. The productivity information is based on the age of the birds, since after a laying hen has passed its prime it tends to lay fewer eggs.

In addition to providing the poultry industrymen with a more equitable indemnity for their destroyed flocks, Task Force officials said they hope the new formula will encourage continued industry cooperation in the effort to eradicate exotic Newcastle disease from southern California.

The Task Force goal is to use its sentinel bird program to remove the quarantine from areas where it is still in effect. The sentinel birds recently aided in removal of quarantines from Los Angeles and Orange Counties. The next objective, said Task Force officials, is to use the birds to lift the quarantines from western Riverside, southwestern San Bernardino and Ventura counties.

"With the cooperation of the poultrymen in the quarantined areas, we are sure we can rapidly release these restrictions with the help provided by sentinel birds," Dr. R. E. Omohundro, director of the State-Federal Task Force said. "We want to relieve the poultry industry and associated businesses of the hardships of this quarantine as quickly as possible," he emphasized.

Office - Supreme Court, U.S.
FILED
JUN 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1645

In the Supreme Court of the United States

OCTOBER TERM, 1982

JULIUS GOLDMAN'S EGG CITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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JULIUS GOLDMAN'S EGG CITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in dismissing its claim for additional indemnification for the fair market value of its destroyed poultry flock under 21 U.S.C. (1970 ed.) 114-114a, 134-134h, and 9 C.F.R. 53.3 (1975).

1. Petitioner's poultry were ordered destroyed by the Secretary of Agriculture for the purpose of controlling an exotic poultry disease, Velogenic Viscerotropic Newcastle disease (Pet. App. 1a-2a). The disease first appeared in commercial poultry flocks in southern California in November 1971. When the disease threatened to spread throughout the country, the Secretary exercised his statutory authority to declare a national emergency and, with the cooperation of California health authorities, instituted a

program to quarantine and destroy the infected flocks and pay the owners the fair market value of their destroyed flocks (Pet. App. 2a, 14a).

The flocks in approximately 160 ranches in eight affected counties were appraised and destroyed, compensation was paid to the owners, and the ranches were cleaned and disinfected. A task force of 1,500 persons, including veterinarians and agricultural economists, carried out the operation. The initial indemnity paid to all the owners was $17.7 million; this sum was later supplemented by a payment of $5.6 million, for a total of more than $23 million (Pet. App. 2a-3a, 14a).

On September 7, 1972, the Secretary determined that petitioner's flock had been exposed to the disease. Petitioner's egg ranch in Ventura County, California, the largest in the world, housed some 3.4 million (or 31%) of the 11 million chickens that were destroyed (Pet. App. 3a, 14a). The destruction of petitioner's flock and the cleaning and disinfecting of its facilities were completed on December 26, 1972, and petitioner was permitted to begin bringing replacement chickens back into its premises on February 1, 1973 (*id.* at 3a). Petitioner was paid approximately $5.2 million as an initial indemnity and $2 million as a supplemental indemnity, a total of some $7.2 million, or 31% of the more than $23 million paid out under the program (*id.* at 3a, 14a).

In October 1975, petitioner filed a petition in the United States Court of Claims for additional payments of indemnities (Pet. App. 3a, 14a-15a). After a trial on the merits, the lower court dismissed the petition (*id.* at 15a), holding that petitioner had not met its burden of showing that it was inadequately compensated for the fair market value of its flock (*id.* at 17a) and that the initial and supplemental indemnities, taken together, were the product of a rational,

bona fide effort by the Secretary to fix the fair market value of the destroyed birds (*id.* at 17a-18a). The court of appeals affirmed (*id.* at 1a-12a; 697 F.2d 1051).

2. Petitioner concedes that the standards adopted by the Secretary pursuant to 21 U.S.C. (1970 ed.) 114-114a, 134-134h, and 9 C.F.R. 53.3 (1975), "were reasonable on their face" (Pet. 4). Thus, petitioner's sole challenge is to the application of those standards to the particular facts presented in this case. There is no occasion for this Court to decide an issue of such limited significance. In any event, the decision of the court of appeals is plainly correct.

a. Petitioner first argues (Pet. 5-10) that the Secretary disregarded his announced standards in carrying out the indemnification program. In essence, petitioner contends that the formulas established by the Secretary for determining the fair market value of the destroyed flocks — while generally reasonable — were inappropriate when applied to petitioner. But petitioner received an appropriate pro rata share of the indemnification program (31% of the total payment as compensation for 31% of the number of destroyed chickens) — a clear indication that the Secretary acted in a fair and even-handed manner.

The statute provides that the Secretary "shall" compensate the owners of diseased animals destroyed pursuant to the section and that "[s]uch compensation shall be based upon the fair market value as determined by the Secretary, of any such animal * * * at the time of the destruction thereof." 21 U.S.C. (1970 ed.) 134a(d). The fair market value of chickens therefore "shall be determined by the * * * egg production * * * value of such animals." 9 C.F.R. 53.3(b) (1975). In assessing the fair market value of chickens, the Secretary found that there was no actual market for chickens of various ages but only for day-old chicks or 20-week old pullets. In light of this fact, the

Secretary, by adding the $1.65 market price for a 20-week old pullet to the 35-cent estimated average cost of raising the pullet to 26 weeks, concluded that $2.00 was a fair market value for an average prime-age 26-week old chicken, the age when an egg-laying chicken becomes profitable (Pet. App. 6a-7a). While $2.00 was the maximum allowable payment for a chicken of the optimum age, the values were not absolute, but rather served as a guideline for negotiating with the ranchers. Each rancher was paid an indemnity in accordance with an agreement reached on the basis of the guidelines (*id.* at 7a, 16a).

Following the payment of the initial indemnity, egg prices rose and the Secretary concluded that the guidelines for the initial indemnity were thus inadequate to pay the fair market value of the destroyed flocks. Accordingly, each rancher was paid a supplemental indemnity based on a formula that included the rancher's theoretical lost profits from his flock during the 26 weeks following destruction (Pet. App. 7a, 17a).

Petitioner argues that the application of the initial indemnity formula did not provide adequate compensation for the actual cost it incurred in replacing its flock. Specifically, petitioner contends that the formula was obsolete by the time its birds were destroyed and that its costs were higher because it raised birds that were healthier and more productive than those at other ranches.[1] This argument is

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[1]The applicable regulations permitted the appraisal of animals in groups (9 C.F.R. 53.3(b) (1975)). The Secretary determined that egg-laying chickens had the same value per head and, thus, based the initial indemnity guidelines on the value of the average chicken (Pet. App. 7a, 20a). Since the valuation of domestic animals such as chickens is a matter Congress has delegated to the Secretary in light of the Secretary's expertise, see *Nabisco, Inc.* v. *United States*, 599 F.2d 415, 422 (Ct. Cl. 1979), and since there was no evidence that the Secretary was wrong, the court of appeals correctly held that such a valuation was not unreasonable (Pet. App. 7a). See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

without merit. Replacement cost is not synonymous with replacement value, and the cost to a single entrepeneur is not the equivalent of fair market value. *United States* v. *Toronto, Hamilton & Buffalo Navigation Co.*, 338 U.S. 396, 406 (1949). Furthermore, the court of appeals affirmed the trial court's finding that petitioner had failed to show that its flock had a fair market value greater than the amount that was paid to it; there were no objective data in the record that supported petitioner's claim that its chickens were more valuable or more productive than average chickens (Pet. App. 9a & n.4, 20a).[2] Thus, the Secretary's application of the initial indemnity formula to petitioner was reasonable and appropriate.

Petitioner also argues that the supplemental indemnity was inadequate because it was based on the hypothetical lost profits from egg production in a 26-week period when it took substantially longer than 26 weeks to repopulate petitioner's ranch. This argument fails because, contrary to petitioner's interpretation of the indemnity, the supplemental indemnity was not intended as payment for all lost profits for egg production following the destruction of the ranchers' flock. See Pet. App. 8a. Rather, it was an adjustment or addition to the initial determination of the fair market value to the extent that the earlier payment was perceived as inadequate to compensate for the egg-producing profit element of the fair market value at the time of destruction (see *id.* at 10a). The Secretary's formulation for the supplemental indemnity was fair and reasonable, and his judgment is entitled to deference. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).[3]

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[2]This Court has declined to review factual determinations in which the trial court and the court of appeals have concurred, absent the most exceptional circumstances. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

[3]Because the Secretary did follow the regulations and standards he adopted, the cases cited by petitioner (Pet. 9) are inapposite.

b. Petitioner next contends (Pet. 10-13) that the lower courts improperly substituted their own definition of fair market value for that adopted by the Secretary. In this regard, petitioner simply disagrees with the Secretary's interpretation of the statute and regulations and the lower courts' approval of that interpretation. Moreover, the argument that the courts adopted a definition of fair market value that differed from the Secretary's is rebutted by the face of the opinions. The court of appeals clearly held that the standard of review is not the court's own view of fair market value but the propriety of the Secretary's determination pursuant to his statutory authority (Pet. App. 5a). The court noted that it was guided by the principle that the Secretary's construction of the statute should be followed absent "compelling indications that it is wrong" (*Red Lion Broadcasting Co.* v. *FCC, supra,* 395 U.S. at 381), and that an agency's interpretation of its own regulations is to be upheld if it has a rational basis, even if it is not the result that the court would have reached in the first instance. *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 153 (1946); *Nabisco, Inc.* v. *United States,* 599 F.2d 415, 419 (Ct. Cl. 1979). Pet. App. 5a-6a. This Court recently reaffirmed that this is the correct standard for review of administrative action. *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 20. In addition, the court of appeals held (Pet. App. 6a) that "when the Secretary's determination involves the exercise of administrative discretion, the review court must defer to his judgment as to where to draw the lines."

Thus, the lower courts reviewed the Secretary's determination of the fair market value of petitioner's flock by analyzing the purposes and application of both the initial and supplemental indemnities (Pet. App. 6a-10a, 16a-24a).

Since the lower courts found that the Secretary's interpretation of the statute and regulations was reasonable, they deferred to the Secretary's determination and, clearly, did not substitute their own judgments for that of the Secretary.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 82-1645

IN THE

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v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner Julius Goldman's Egg City takes exception to the arguments at page 3 of the Memorandum in Opposition to the effect that the issue presented is solely a challenge to the application of regulatory standards to particular facts and that "[t]here is no occasion for this Court to decide an issue of such limited significance."

The payment of indemnities for animals destroyed by order of the Secretary of Agriculture to prevent the spread of disease is a recurring issue of considerable importance, particularly to ranchers but also to the public generally. Prompt destruction of diseased animals requires the cooperation of ranchers which can be achieved only if they know that they will be fairly compensated in accordance with published regulations tailored by the Sec-

retary of Agriculture for application to their particular animals and agricultural enterprises. Thus, the integrity of the compensatory system is the key to the public cooperation which is essential to the success of the program. In the present case, the Secretary's prescribed and published two-tiered system of indemnification—(1) replacement cost, plus (2) lost income during the repopulation period—was not applied to Egg City, the ranch that accounted for more than 30% of the poultry destroyed under the program. The Court below permitted the Department of Agriculture to ignore the Secretary's published standards and concluded that Egg City had received "adequate compensation" and had failed to establish that it had actually received "inadequate compensation."

The Court below plainly misconceived the deference to be accorded administrative decisions. The issue in this case does not involve the question whether the courts should defer to the Agriculture Department in the construction of a statute it administers. The Secretary of Agriculture undoubtedly has wide discretion in formulating indemnification standards under the statute. Once having established such standards, however, he has no discretion to ignore them. Yet, the Court below "deferred" to the Secretary's efforts to justify the indemnity paid to Egg City on a basis other than the two-tiered indemnification standard he promulgated.

The Petition thus presents a significant and continuing issue, namely, whether a rancher is entitled to indemnification for destruction of his animals on the basis of strict adherence to standards promulgated by the Secretary of Agriculture. Under the decision below, ranchers are without a remedy if the Secretary of Agriculture departs from his own standards and a Court concludes that there was "a rational basis for the Secretary's determination," because the compensation awarded, though inconsistent with the promulgated standards, seems "adequate" to the Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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